Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

STATE OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in invalidating an EPA rule on the ground that the phrase "any physical change" in the definition of "modification" in Section 111(a)(4) of the Clean Air Act, 42 U.S.C. 7411(a)(4), unambiguously requires EPA to adopt the broadest meaning of the phrase.

PARTIES TO THE PROCEEDINGS

The United States Environmental Protection Agency is the petitioner in this Court and was the respondent in the court of appeals.

The following parties are respondents in this Court and were petitioners in the court of appeals: State of New York; People of the State of California ex rel. Bill Lockyer, Attorney General of California, and California Resources Board; State of Connecticut; State of Delaware; State of Illinois; State of Maine; State of Maryland; Commonwealth of Massachusetts; State of New Hampshire; State of New Jersey; State of New Mexico ex rel. Patricia Madrid, Attorney General and Ron Curry, Secretary of the Environment Department; Commonwealth of Pennsylvania, Department of Environmental Protection; State of Rhode Island; State of Vermont; State of Wisconsin; District of Columbia; City of New York; City of San Francisco; City of Groton, Connecticut; City of Hartford, Connecticut; City of Middletown, Connecticut; City of New Haven, Connecticut; City of New London, Connecticut; City of Stamford, Connecticut; City of Waterbury, Connecticut; Town of Cornwall, Connecticut; Town of East Hartford, Connecticut; Town of Greenwich, Connecticut; Town of Hebron, Connecticut; Town of Lebanon, Connecticut; Town of Newtown, Connecticut; Town of North Stonington, Connecticut; Town of Pomfret, Connecticut; Town of Putnam, Connecticut; Town of Rocky Hill, Connecticut; Town of Salisbury, Connecticut; Town of Thompson, Connecticut; Town of Wallingford, Connecticut; Town of Washington, Connecticut; Town of Westbrook, Connecticut; Town of Westport, Connecticut; Town of Weston, Connecticut; Town of Woodstock, Connecticut; South

Coast Air Quality Management District; Natural Resources Defense Council; Environmental Defense; Sierra Club; American Lung Association; Communities for a Better Environment; United States Public Interest Research Group; Alabama Environmental Council; Clean Air Council; Group Against Smog and Pollution; Michigan Environmental Council; The Ohio Environmental Council; Scenic Hudson; Southern Alliance for Clean Energy; Delaware Nature Society.

The following were intervenors in the court of appeals: Adirondack Mountain Club; Commonwealth of Virginia; State of Alabama; State of Alaska; State of Arkansas; State of Kansas; State of Missouri; State of Nebraska; State of North Dakota; State of South Dakota; State of Utah; State of Wyoming; Clean Air Implementation Project; Utility Air Regulatory Group; National Environmental Development Association's Clean Air Regulatory Project; Equipment Replacement Rule Coalition; Alliance of Automobile Manufacturers; Illinois State Chamber of Commerce; Illinois Environmental Regulatory Group; Steel Manufacturers Association; Specialty Steel Industry of North America; American Iron and Steel Institute.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Environmental Protection Agency (EPA), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 443 F.3d 880. The order of the court of appeals denying rehearing (Pet. App. 18a-19a) is unreported. The order of the Environmental Protection Agency (Pet. App. 20a-175a) is reported at 68 Fed. Reg. 61,248.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2006. A petition for rehearing was denied on June 30, 2006. On September 21, 2006, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including October 30, 2006. On October 23, 2006, Justice Stevens further extended the time to November 27, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant sections of the Clean Air Act, 42 U.S.C. 7401 *et seq.*, and of EPA's rules are set forth in the appendix to this petition at 176a-181a.

STATEMENT

1. Under the Clean Air Act, each State must establish a plan for attaining, and then maintaining, nationally established standards for airborne levels of six "criteria" pollutants. Specifically, the Act directs EPA to promulgate National Ambient Air Quality Standards (NAAQS) specifying allowable concentrations of each criteria pollutant in the ambient air. 42 U.S.C. 7409. Each State must adopt State Implementation Plans (SIPs) for attaining and maintaining the NAAQS in all areas within the State. 42 U.S.C. 7407(a), 7410.

Each SIP must include a program requiring preconstruction review of "the modification and construction of any stationary source within the areas covered by the [SIP] as necessary to assure that national ambient air quality standards are achieved." 42 U.S.C. 7410(a)(2)(C). Depending on the attainment or nonattainment status of the area and the results of the pre-

construction review, the source may be required to install pollution controls as part of the construction or modification.[1] Those preconstruction review and permitting requirements are known collectively as the New Source Review (NSR) program. Congress adopted the statutory major source NSR program as part of the 1977 amendments to the Act. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685.[2] Prior to enactment of the statutory NSR program, EPA had promulgated a regulatory PSD program in response to a lawsuit claiming that the Act required EPA to ensure that air quality did not deteriorate in areas meeting the NAAQS. See *Sierra Club* v. *Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972), aff'd without opinion, 4 Env't Rep. Cas. (BNA) 1815 (D.C. Cir. Nov. 1, 1972), aff'd by an equally divided court, 412 U.S. 541 (1973); see also 39 Fed. Reg. 42,510 (1974).

Since 1977, when Congress created the statutory NSR program, the Act has defined "modification" by cross-reference to the statutory definition of that term in the Act's New Source Performance Standards (NSPS)

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[1] In areas meeting the NAAQS (attainment areas) and in "unclassifiable" areas, the "Prevention of Significant Deterioration" (PSD) requirements under Part C of Title I of the Act apply. See 42 U.S.C. 7470-7479. Permits for major sources subject to PSD must require the facility to employ the "best available control technology," or BACT. 42 U.S.C. 7475(a)(4). In areas not meeting the NAAQS (nonattainment areas), the nonattainment NSR requirements of Part D of Title I of the Act apply. See 42 U.S.C. 7501-7515. Permits for major sources subject to nonattainment NSR must require that the facility achieve the "lowest achievable emission rate," or LAER. 42 U.S.C. 7501(3), 7503(a)(2).

[2] Initially, only the nonattainment NSR program was made applicable to "modified" sources. In a later technical amendment, Congress clarified that the PSD program also applies to such sources. Act of Nov. 16, 1977, Pub. L. No. 95-190, § 14(a)(54), 91 Stat. 1402.

program, originally included as part of the 1970 amendments to the Act.[3] Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676. Under that definition, a modification is "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. 7411(a)(4) (NSPS definition); see 42 U.S.C. 7479(2)(C) (for PSD, "'construction' * * * includes the modification (as defined in section 7411(a) of this title) of any source or facility"), 7501(4) (for nonattainment NSR, "'modifications' and 'modified' mean the same as the term 'modification' as used in section 7411(a)(4) of this title.").

EPA regulations have long excluded some activities from the definition of "modification." For instance, since 1971, EPA regulations elucidating what constitutes a "modification" for purposes of NSPS have provided that "[r]outine maintenance, repair, and replacement" (RMRR) of equipment at a source is not a "modification." See 36 Fed. Reg. 24,887; see also 40 C.F.R. 60.14(e)(1); Pet. App. 119a. The regulations that EPA promulgated in 1974 to implement the original regulatory PSD program defined "modification" in largely the same way as it was defined for the existing NSPS program, and they treated RMRR comparably to its treat-

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[3] In those 1970 amendments, Congress defined a "new source" to include stationary sources "the construction *or modification* of which" began after a specified time. 42 U.S.C. 7411(a)(2) (emphasis added). Major stationary sources are stationary sources that exceed annual emission tonnage thresholds in the CAA. 42 U.S.C. 7479(1), 7602(j). For sources below the major thresholds, the 1977 amendments did not impose the provisions of parts C and D. For those "minor" sources, Section 110(a)(2)(C) alone controls. See 42 U.S.C. 7410(a)(2)(C).

ment in the NSPS program. See 39 Fed. Reg. 42,514.[4] EPA's 1978 regulations that first implemented the statutory PSD program again excluded RMRR from the scope of what constituted a "change" for purposes of the definition of "modification." 43 Fed. Reg. 26,403-26,404; see Pet. App. 121a.

"Routine maintenance" is not defined in any of those regulations. Rather, the RMRR exclusion has, since its inception, relied on a "case-by-case determination * * * weighing the nature, extent, purpose, frequency, and cost of the work as well as other factors to arrive at a common sense finding" of whether the work involved amounted to routine maintenance. Pet. App. 3a-4a (quoting 67 Fed. Reg. 80,292-80,293 (2002)); see *Wisconsin Elec. Power Co.* v. *Reilly*, 893 F.2d 901, 910 (7th Cir. 1990).

2. EPA has historically interpreted the RMRR exclusion narrowly, and it has often found that replacement of plant components with identical or functionally equivalent components does not qualify as RMRR. See Pet. App. 31a, 34a. Over time, however, EPA concluded that a narrow interpretation, while reasonable, produced undesirable results.

In 2002, EPA proposed making changes to the RMRR exclusion, 67 Fed. Reg. 80,290, and in 2003, EPA adopted the new Equipment Replacement Provision (ERP) at issue in this case. Pet. App. 20a-175a. EPA noted that, under its pre-ERP approach, "it can be difficult for the owner or operator to know with reasonable certainty whether a particular activity constitutes RMRR." *Id.* at 32a. EPA concluded that its pre-ERP

[4] The pre-statutory PSD program was followed by the first pre-statutory nonattainment NSR program in 1976. 41 Fed. Reg. 55,524-55,525, 55,558.

approach, and the uncertainties associated with it, "tends to have the effect of leading sources to refrain from replacing components, to replace them with inferior components, or to artificially constrain production in other ways," without significant environmental benefits over an alternative approach. *Id.* at 35a. EPA found that its pre-ERP approach "can discourage replacements that would promote safety, reliability and efficiency even in instances where, if the matter were brought to EPA, [the agency] would determine that the replacement in question was RMRR." *Ibid.* In EPA's view "[s]uch discouragement results in lost capacity and lost opportunities to improve energy efficiency and reduce air pollution." *Ibid.*

The ERP, as adopted by EPA, provides that RMRR includes, but is not limited to, an activity if "(1) [i]t involves replacement of any existing component(s) of a process unit with component(s) that are identical or that serve the same purpose as the replaced component(s); (2) the fixed capital cost of the replaced component(s), plus costs of any activities that are part of the replacement activity * * *, does not exceed 20 percent of the current replacement value of the process unit; and (3) the replacement(s) does not alter the basic design parameters of the process unit or cause the process unit to exceed any emission limitation or operational limitation * * * that is legally enforceable." Pet. App. 41a (footnote omitted); see *id.* at 4a. EPA reasoned that equipment replacements that satisfy those requirements would be understood as maintaining existing functions rather than as making a physical change. They would thus satisfy Congress's intent to generally exclude existing plants from the need to obtain NSR permits and "to avoid the need to impose costly retrofits, but require

replacement of new control technology at a time when it makes the most sense for it to be installed." *Id.* at 123a; see *id.* at 126a.

3. The court of appeals held that the ERP violates the Clean Air Act, and it vacated the rule. Pet. App. 1a-17a.

The dispute between the parties has to do with the construction of the phrase "any physical change" in Section 7411(a)(4) of the Act.[5] The court of appeals accepted that the phrase "'physical change' is susceptible to multiple meanings." Pet. App. 5a. The court concluded, however, that the "essential disagreement" in the case "centers on the effect of Congress's decision in defining 'modification' to insert the word 'any' before 'physical change.'" *Id.* at 6a.

The court of appeals noted that "[i]n a series of cases, the Supreme Court has drawn upon the word 'any' to give the word it modifies an 'expansive meaning' when there is 'no reason to contravene the clause's obvious meaning.'" Pet. App. 7a (quoting *Norfolk S. Ry.* v. *Kirby*, 543 U.S. 14, 31-32 (2004)). Although the court recognized that "EPA is correct that the meaning of 'any' can differ depending upon the statutory setting," the court concluded that "the context of the Clean Air Act warrants no departure" from what it believed was "the word's customary effect." *Id.* at 8a (citation omitted). The court noted that, unlike in *Nixon* v. *Missouri Municipal League*, 541 U.S. 125, 132 (2004), where a statute with the term "any" was construed less broadly, "the question of statutory interpretation here does not

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[5] The meaning of a different part of the definition of modification in Section 7411(a)(4)—the phrase "increases the amount of any air pollutant emitted"— is currently before the Court in *Environmental Defense* v. *Duke Energy Corp.*, No. 05-848 (argued Nov. 1, 2006).

arise in a setting in which the Supreme Court has required heightened standards of clarity to avoid upsetting fundamental policies," and no "strange and indeterminate results * * * would emerge from adopting" what the court believed was "the natural meaning of 'any' in section [7411(a)(4)]." Pet. App. 8a.

In the court's view, other considerations supported its conclusion. The court noted that it "has construed the definition of 'modification' broadly" in other respects. Pet. App. 9a. The court also believed that the term "any" would be rendered superfluous if it were not construed to require an expansive interpretation of the words that follow. *Id.* at 10a. Finally, the court noted that the statute itself imposes limitations on the "physical changes" that are covered; they must "increase[] the amount of any air pollutant emitted * * * or * * * result[] in the emission of any air pollutant not previously emitted." 42 U.S.C. 7411(a)(4). The court stated that, "[b]ecause Congress expressly included one limitation, the court must presume that Congress acted intentionally and purposely when it did not include others." Pet. App. 12a (citations and internal quotation marks omitted); see *id.* at 17a ("As Congress limited the broad meaning of 'any physical change,' directing that only changes that increase emissions will trigger NSR, no other limitation (other than to avoid absurd results) can be implied.").

The court concluded that "when Congress places the word 'any' before a phrase with several common meanings, the statutory phrase encompasses each of those meanings" and "the agency may not pick and choose among them." Pet. App. 12a; see *id.* at 14a ("Congress's use of the word 'any' indicates the intent to cover all of the ordinary meanings of the phrase."); *id.* at 17a ("Con-

gress's use of the word 'any' in defining a 'modification' means that all types of 'physical changes' are covered."). In the court's view, the pre-existing RMRR exclusion did not contravene that principle, because it was "based on a *de minimis* rationale." *Id.* at 15a. The court held, however, that because "the ERP would allow equipment replacements resulting in non-*de minimis* emission increases to avoid NSR," the ERP rule "violates the Act." *Id.* at 17a.

REASONS FOR GRANTING THE PETITION

The court of appeals vacated the results of a significant rulemaking initiative by EPA that was designed to remedy problems with the former, case-by-case RMRR approach, and thereby ease compliance by regulated entities, lighten administrative burdens on state and federal enforcement agencies, and, ultimately, encourage investment in newer, more efficient, and cleaner facilities. The court of appeals reached that result by holding that, although "physical change" is ambiguous, the phrase "*any* physical change" is unambiguously broad. In so holding, the court not only invalidated a critically important rulemaking but also announced a sweeping rule of construction that would operate to deprive administrative agencies of discretion to construe ambiguous statutory terms whenever those terms are preceded by the word "any"; in the court's view, Congress's use of the word "any" generally compels adoption of the broadest construction of whatever follows, effectively eliminating ambiguities that would otherwise be left for agency interpretation. That holding, with its premise that the single word "any" effectively eliminates agency discretion, is inconsistent with *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), and with this Court's

repeated admonitions that statutes must be construed in context and as a whole. Moreover, it threatens to put both EPA and other agencies charged with administering statutes that employ the term "any" in an unwarranted straitjacket.

While the term "any" may be used to connote breadth, it does not express the "clear intent" of Congress to adopt one and only one meaning—namely, the broadest reasonable construction—of the words that follow. It therefore does not preclude the exercise of discretion by EPA to define the phrase "physical change" in a way that reasonably differentiates between routine maintenance (which, as the phrase suggests, maintains rather than changes an entity) and physical changes. Indeed, the logic of the D.C. Circuit's construction of the word "any" would endanger far more than just the EPA's current rulemaking. Before EPA's promulgation of the ERP, there was a long history of a variety of exclusions—including in the regulatory program on which Congress modeled the PSD provisions of the Act—from the scope of a "physical change * * * or change in the method of operation," 42 U.S.C. 7411(a)(4). Those exclusions cannot be justified on the rationale that they cause only a de minimis increase in emissions (and even a de minimis exclusion itself would be hard to square with the court of appeals' construction of "any," taken to its logical extreme). Accordingly, all of those exclusions (including applications of even the original RMRR exclusion itself) are placed into jeopardy by the court of appeals' holding in this case.

Absent this Court's review, the court of appeals' decision on this petition for review will be the final word on this important regulatory initiative, and it will threaten related and similarly significant Clean Air Act exclu-

sions. Equally important, given the role of the D.C. Circuit in review of agency regulations generally, that court's unjustifiably broad reading of the common statutory term "any" to eliminate virtually all ambiguity in the terms that follow will needlessly and improperly limit agency action in a wide variety of areas. Further review is warranted.

A. The Decision Below Is Incorrect

1. The court of appeals acknowledged that, in promulgating the ERP, EPA was construing the definition of "modification" in the Clean Air Act, and that the validity of EPA's interpretation was accordingly governed by the principles of *Chevron*. See Pet. App. 5a. Under those principles, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-843. If the intent of Congress is not "unambiguously expressed," however, *Chevron* "requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005).

The court of appeals in this case correctly recognized that the phrase "physical change" is ambiguous, and it did not dispute that the ERP would represent a permissible construction of that phrase. See Pet. App. 5a-6a (citing various dictionary definitions of "change," including "make over to a radically different form"). Relying almost exclusively on Congress's use of the word "any," however, the court concluded that the phrase "any physical change" is *un*ambiguous, and that it necessarily en-

compasses everything covered by "all of the ordinary meanings of the phrase." *Id.* at 14a. That conclusion contravenes this Court's consistent recognition that a statutory term must be construed not in isolation, but in light of its entire context. *E.g.*, *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). The mere addition of the word "any" is insufficient to establish that Congress had a clear intent that the phrase "physical change" must necessarily be given its broadest meaning.

This Court has a long history of considering the import of the word "any," beginning with *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (Marshall, C.J.). In some cases, the Court has concluded that use of the word "any" was intended to give the term that follows an "expansive meaning." See, *e.g.*, *Norfolk S. Ry.* v. *Kirby*, 543 U.S. 14, 31-32 (2004); *Department of Housing & Urban Dev.* v. *Rucker*, 535 U.S. 125, 130-131 (2002); *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997); *Harrison* v. *PPG Indus.*, 446 U.S. 578, 588-589 (1980). Those cases, however, generally involved the Court's own determination of the best meaning of the language at issue, not the clearly distinct question presented in the *Chevron* context, namely, whether an agency interpretation of statutory text is reasonable. In *Norfolk Southern*, for example, the Court addressed "a simple question of contract interpretation," 543 U.S. at 30; in *Gonzales*, a criminal sentencing statute; and in *Harrison*, the jurisdiction of federal courts of appeals. An agency interpretation of a statute was involved in *Rucker*, but the Court *agreed* with the agency construction at issue, see 535 U.S. at 130, and, as in the other cases cited above, the Court expressly relied on a combination of factors—not merely the word "any" alone—to support its conclusion that the phrase "any drug-related

criminal activity" did not contain an implicit knowledge requirement. *Id.* at 130-131 ("Congress' decision not to impose any qualification in the statute, *combined with* its use of the term 'any' to modify 'drug-related criminal activity,' precludes any knowledge requirement.") (emphasis added).

Moreover, the Court has concluded in other cases that, while the word "any" does suggest breadth, it does not necessarily mandate the broadest interpretation of what follows. See, *e.g.*, *Nixon* v. *Missouri Mun. League*, 541 U.S. 125, 132 (2004) ("'any' can and does mean different things depending upon the setting"); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981); *Palmer*, *supra*. More recently, in *Small* v. *United States*, 544 U.S. 385, 388 (2005), the Court noted that "a speaker who says, 'I'll see any film,' may or may not mean to include films shown in another city." The Court concluded that "even though the word 'any' demands a broad interpretation, * * * we must look beyond that word itself." *Ibid.* (citation omitted); see *id.* at 391 ("statutory language, context, history, [and] purpose"); *Nixon*, 541 U.S. at 132 (meaning of the word "any" "depend[s] upon the setting"). As the Court said in *Flora* v. *United States*, 362 U.S. 145, 149 (1960), in connection with the phrase "any sum," "[a] catchall the phrase surely is; but to say this is not to define what it catches."[6]

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[6] The court of appeals suggested that, if "any" does not serve the function of requiring the broadest construction of what follows, it would be superfluous. Pet. App. 10a. That would no more be true in this case than in *Nixon*, *Sea Clammers*, *Palmer*, *Small*, and *Flora*, in each of which this Court did *not* adopt the broadest construction of the statute at issue. In all of those settings, the term "any" continues to serve its ordinary function of suggesting the absence of any *other* limitation once

Indeed, the rule of construction announced by the court of appeals—that "any" ordinarily requires the phrase it modifies to be construed to encompass *all* of its possible "ordinary meanings," Pet. App. 7a—is irreconcilable with this Court's decision in *Chevron* itself, which involved the same statute and the same definitional section at issue here. This Court's analysis in *Chevron* focused on the scope of EPA's discretion to interpret the term "stationary source," which is defined in the Clean Air Act's NSPS provision to mean "*any* building, structure, facility, or installation which emits or may emit any air pollutant." 42 U.S.C. 7411(a)(3) (emphasis added). Referring to that definition, this Court emphatically rejected the argument that the statutory text deprived EPA of discretion to adopt an interpretation of "stationary source" that was less inclusive than its broadest possible construction. Even though the Court *agreed* with the respondents' argument that the text "could be read to impose the [NSR] permit conditions on an individual building that is a part of a plant," 467 U.S. at 860, the Court nonetheless concluded that EPA's narrower interpretation was also reasonable. *Id.* at 861. The Court simply was "not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of

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the agency has settled on a reasonable interpretation of the phrase following "any"—here, "physical change." Indeed, it appears that "any" served precisely that function in *Rucker*, for example, where the question was whether to add an extra-statutory knowledge requirement to the statutory phrase "any drug-related criminal activity." See 535 U.S. at 130-131. There was no indication in *Rucker*, by contrast, that HUD would not have discretion to determine whether a crime designed to raise funds to purchase drugs would be sufficiently "drug-related" to satisfy the statute.

Congress," *ibid.*, and instead upheld the agency's view that "the definition itself is flexible," *id.* at 864.

The decision below thus stands in flagrant opposition to *Chevron*. Under the court of appeals' approach, the phrase at issue in *Chevron* would have had to encompass the broadest meaning of "any building," including a building that was part of a larger plant. This Court held the opposite. If the phrase "any building, structure, facility, or installation," 42 U.S.C. 7411(a)(3), need not be given the widest possible meaning, as *Chevron* squarely concludes, it begs credulity to suggest that such breadth is required by the use of "any" *in the very next paragraph of the same Section of the same Act.* This Court's *Chevron* decision compels the conclusion that the rule of construction announced by the court of appeals is wrong, and egregiously so.

2. In the context presented here, the word "any" is plainly not sufficient to establish that Congress had an "unambiguously expressed intent," *Chevron*, 467 U.S. at 843, to adopt the broadest meaning of the phrase that follows ("physical change * * * or change in method of operation") and to permit a narrower reading only when justified on the ground that such a reading would lead to a de minimis impact on emissions. To the contrary, the statutory context demands that a distinction be made between routine efforts to maintain a facility's current method of operation and efforts to change the facility or its method of operation. Not only is there inherent ambiguity in the phrase "physical change * * * or change in the method of operation" in this context—whether or not modified by "any"—but there is also other evidence that Congress wanted to permit a degree of administrative flexibility.

a. As this Court has explained, "where 'Congress has not just kept its silence by refusing to overturn [a prior] administrative construction, but has ratified it with positive legislation,'" that agency's prior construction must be accepted "as a defensible construction of the * * * statute." *TWA* v. *Hardison*, 432 U.S. 63, 76 n.11 (1977) (quoting *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 381-382 (1969)). See, *e.g.*, *Young* v. *Community Nutrition Inst.*, 476 U.S. 974, 983 (1986). Congress is presumed to legislate with awareness of prior administrative regulations, and when it elects to use statutory language that has already been given an interpretive gloss by the administering agency, it should ordinarily be presumed to intend to allow the agency to continue to employ that regulatory gloss.

That inference of congressional approval is fully applicable here. When Congress enacted the statutory NSR program in 1977, cross-referencing the pre-existing NSPS statutory definition of "modification," it acted in a context in which EPA had already interpreted that key provision to exclude some activities that would fall within the broadest conception of "physical change * * * or change in the method of operation," 42 U.S.C. 7411(a)(4), including activities that unquestionably could increase emissions in non-trivial ways. When EPA originally promulgated regulations to effectuate the NSPS program in 1971, it had, subject to certain conditions, excluded "[a]n increase in the production rate," "[a]n increase in hours of operation," and "[u]se of an alternative fuel or raw material" from the scope of what constitutes a "modification." See 36 Fed. Reg. 24,877 (40 C.F.R. 60.2(h)(2)(i)-(iii)(1972)). When EPA established the regulatory PSD program in 1974, it again provided for the same exclusions, this time expressly tying them

to the terms "physical change * * * or change in the method of operation." See 39 Fed. Reg. 42,514 (providing that "[a]n increase in the production rate" or in "hours of operation," or "[u]se of an alternative fuel or raw material," "shall not be considered a change in the method of operation."). The agency could presumably have construed the statutory phrase "any physical change * * * or change in the method of operation" to be sufficiently broad to cover those excluded activities. But, from the beginning, it has not done so.

Although even the court of appeals suggested (without fully justifying) that Congress's use of the word "any" could co-exist with an exclusion for activities that had a de minimis impact on emissions, none of the above exclusions were, or could have been, justified on that ground. See Pet. App. 131a-132a. For example, as EPA noted, "by doubling hours of operation, a 500 [tons per year] emitting plant could conceivably double its emissions," an increase that would be "far above any level EPA has ever thought justifiable as *de minimis*." *Id.* at 134a. The same could easily be true of a source that increased its production rate or switched to an alternative, and more polluting, fuel. Yet those exclusions have nonetheless been embodied in both the NSR program and the NSPS program since their creation, and their modern-day successors remain in those programs today. See, *e.g.*, 40 C.F.R. 52.21(b)(2)(iii) (NSR); 40 C.F.R. 60.14(e)(2), (3) and (4) (NSPS).

The same has been true of the treatment of RMRR itself. The terms of the RMRR provision focus on whether an activity is "routine," not whether the increase in emissions caused by the activity would be more than de minimis, and EPA has never construed the exclusion to encompass only de minimis emissions in-

creases. Rather, under the RMRR as it was applied prior to promulgation of the ERP, EPA used a five-factor test to determine whether an activity constituted RMRR, considering the activity's nature, extent, frequency, purpose, and cost. See Pet. App. 3a-4a. Only one of those factors—the project's extent—can be read to refer even indirectly to the effect on emissions caused by the project, and even that factor is properly read to refer to the extent of the work required on the project, not the extent of increase in emissions that would result.[7]

Thus, all of EPA's longstanding regulatory exclusions allow, and some necessarily contemplate, excluding from NSR and NSPS at least some activities that could lead to more than de minimis increases in emissions.[8] Those exclusions date from before Congress

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[7] The court of appeals is correct that EPA stated that it had "*generally* interpret[ed]" the RMRR exclusion—as well as other related provisions—narrowly. Pet. App. 15a (emphasis added) (quoting *id.* at 136a). But EPA has never taken the position that all of those exclusions are categorically limited to activities that will result in only de minimis emissions increases, nor can they plausibly be read in that manner. Indeed, if the exclusions were limited to only activities of that nature, there would have been little if any reason to create or retain them, because the NSR program, which applies only to activities that result in "significant" emissions increases, already excludes activities that result in de minimis emissions increases. 40 C.F.R. 52.21(b)(2)(i) and (23). To be sure, it has always been reasonable, and thus open to EPA, to interpret the pre-ERP RMRR rule narrowly. But nothing in EPA's past general practice precludes the agency from improving or adjusting its regulatory approach in response to current conditions, as it did in adopting the ERP.

[8] The court of appeals was mistaken insofar as it relied on the theory that, "[a]s Congress limited the broad meaning of 'any physical change,' directing that only changes that increase emissions will trigger NSR, no other limitation (other than to avoid absurd results) can be implied."

adopted the statutory NSR program in 1977. Yet Congress did not repudiate EPA's settled understanding of those terms. To the contrary, Congress defined "modification" for the NSR program through a cross-reference to the preexisting NSPS statutory definition that EPA had already construed to include those exclusions. See 42 U.S.C. 7479(2)(C). And the new NSR program that Congress adopted was modeled on the pre-existing PSD regulatory program, which also included those exclusions. See 39 Fed. Reg. 42,514 (1974). The court of appeals disregarded the fact that Congress's acceptance of the prior regulatory constructions, which clearly applied to activities that had more than a de minimis effect on emissions, necessarily confirms the permissibility of those exclusions in the NSR context.

Indeed, Congress specifically demonstrated its awareness and approval of the prior regulations (including the exclusions) by mandating that most of the preexisting regulations (including the cited exclusions) "shall remain in effect" until implementation plans are put in place. 42 U.S.C. 7478(a). While Congress made clear that EPA would have discretion to change the regulations after that time, its awareness of the prior regulatory program, and its evident satisfaction with that program in pertinent part, establishes that the prior program, with its exclusions that cannot be justified on the basis of a de minimis rationale, is at the very least "a defensible construction" of the Act. *TWA*, 432 U.S. at

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Pet. App. 17a. The fact that a "modification" is limited to a "change" that results in an increase in emissions provides no guidance whatever as to which of the several permissible meanings of "change" was intended by Congress.

76 n.11.[9] It necessarily follows that, contrary to the court of appeals' holding, the term "any physical change * * * or change in the method of operation" does contain ambiguities that the agency may reasonably resolve, and that those ambiguities encompass interpretations that exclude some activities that have more than a de minimis impact on emissions.

B. The Question Presented Is Important And Warrants Review At This Time

This Court's review is warranted in this case because the court of appeals' ruling conflicts with *Chevron*, announces an erroneous and harmful rule of statutory construction that unduly constrains agency discretion, and overturns an important regulatory initiative that affects a broad range of industrial activity and that sought to bring greater certainty—and, ultimately, both environmental and economic benefits—to a complex regulatory scheme. The breadth of the court's ruling suggests that, even aside from the specific ERP rule, EPA may be hamstrung in developing other approaches in the future to remedy the deficiencies of the current RMRR exclu-

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[9] That the 1977 Amendments render EPA's pre-1977 approach a "defensible construction" of the Act, see *TWA*, 432 U.S. at 76 n.11, does not mean that it is the only permissible interpretation. See U.S. Br. at 47 n.18, *Environmental Defense* v. *Duke Energy Corp.*, No. 05-848 (argued Nov. 1, 2006). This Court has concluded that Congress's use of a pre-existing statutory term demonstrated its intent to freeze a pre-existing regulation only when it has found additional clear demonstrations of such congressional intent in the statute or legislative history. See, *e.g.*, *Bragdon* v. *Abbott*, 524 U.S. 624, 631-632 (1998) (citing statutory language prohibiting use of lesser standard than that incorporated in agency regulations); *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 437-438 (1986) (noting legislative history specified that statutory definition included prior existing regulatory definition).

sion. More generally, the court of appeals' broad holding threatens a number of other pre-existing exclusions under the Clean Air Act. It also threatens to put EPA into a regulatory straitjacket that Congress did not intend, with few if any options to tailor the program to changing conditions and policies, and thereby to achieve environmental benefits. Given the primacy of the D.C. Circuit in review of administrative action generally, the court of appeals' decision in this case similarly threatens the ability of other agencies that administer statutes employing the word "any" to adapt their regulatory programs to the needs and policies of the governing statute.

1. In adopting the ERP, EPA concluded that a "bright-line rule that would obviate the need for case-by-case review under our multi-factor test of appropriate categories of equipment replacements would be extremely useful in addressing many of the problems that we have identified with the current operation of the NSR program." Pet. App. 57a. EPA concluded that the policy of the NSR program "is not to cut back on emissions from existing major stationary sources through limitations on their productive capacity, but rather to ensure that they will install state-of-the-art pollution controls at a juncture where it otherwise makes sense to do so." *Id.* at 35a. Yet EPA noted criticisms of its pre-ERP RMRR approach, which often "disallows replacement of significant plant components with identical or functionally equivalent components," such that "the effect is to discourage plant owners or operators from engaging in replacements that are important to restoring, maintaining and improving plant safety, reliability, and efficiency." *Id.* at 31a; see *id.* at 35a (RMRR approach has led "sources to refrain from replacing components,

to replace them with inferior components, or to artificially constrain production in other ways").

The problems of the pre-ERP approach were exacerbated by the uncertainties inherent in its case-by-case, multifactor nature. EPA noted that, under the pre-ERP rule, "it takes a year, on average, to obtain a determination whether a proposed replacement is routine." Pet. App. 57a. Such a delay "creates perverse disincentives to refrain from equipment replacements and instead repair existing equipment or find some other solution." *Ibid.* It is "also problematic for State and local reviewing authorities," who must "devote scarce resources to make complex determinations" that "are consistent with determinations made for similar circumstances in other jurisdictions." *Id.* at 34a. Indeed, the uncertainties act to "discourage replacements that would promote safety, reliability and efficiency even in instances where, if the matter were brought to EPA, we would determine that the replacement in question was RMRR." *Id.* at 35a.

The ERP "significantly reduce[s]" those problems. Pet. App. 35a. Its effect "should be to remove disincentives to undertaking RMRR activities falling within the rule, thereby enhancing key operational elements such as efficiency, safety, reliability, and environmental performance." *Id.* at 36a. The ERP's effects include "providing the certainty needed to plan and undertake efficiency investments," encouraging firms "to take advantage of * * * new, innovative pollution-reducing technologies," and "preserv[ing] powerful incentives * * * to adopt 'leap-frog' technologies," all of which will lead to reduced costs *and* reduced pollution. *Id.* at 107a-108a (emphases omitted). Indeed, EPA concluded that the ERP's effect of "promoting proper operational planning to facilitate safe, reliable, and efficient operations," "will

have the corresponding environmental benefit of reducing the amount of pollution generated per product produced," as well as "reduc[ing] the resource burden on reviewing authorities" under "the existing, case-by-case process." *Id.* at 44a.

2. The court of appeals' decision invalidating the ERP thus negated a very substantial EPA regulatory initiative to resolve deep-seated problems in the NSR program and the RMRR exclusion, while achieving both economic and environmental benefits. If not reversed, the decision below also threatens to eliminate EPA's ability to address those problems in the future. The court ruled that the agency must choose the broadest reading of the phrase "any physical change," because "Congress's use of the word 'any' indicates the intent to cover all of the ordinary meanings of the phrase." Pet. App. 14a. That ruling casts into doubt even the pre-existing RMRR exclusion, which by its terms and as historically construed encompasses activities that are within the broadest meaning of "physical change."

To be sure, the court of appeals did concede that a narrower construction could be used if the broadest construction would lead to "strange and indeterminate" or "absurd" results, Pet. App. 8a, 14a, or if the narrower construction would have a de minimis effect on emissions, *id.* at 13a-14a. Those qualifications, however, do not alleviate the problems created by the court of appeals' mistaken reading of the statute. The pre-existing RMRR exclusion, and the multifactor test that has been employed to apply it, have never expressly been limited to activities that have a de minimis effect on emissions, nor have they been limited to the avoidance of "absurd" results. Instead, the agency has engaged in a reasonable effort to differentiate routine efforts designed to

maintain an existing facility from activities that amount to a change in the physical plant or its method of operation. Any other means that EPA may consider to address the basic problems targeted by the RMRR exclusion would likely be problematic or impracticable in view of the severe constraints imposed by the court of appeals.

Moreover, as noted above, both the NSPS and NSR programs have included since their inception additional exclusions for hours of operation increases, production rate increases, and fuel and raw material switching. The court of appeals' conclusion places in doubt those other longstanding exclusions as well, because they may be found to exclude activities that fit within "one of the ordinary meanings" of "physical change * * * or change in the method of operation." Pet. App. 7a. The de minimis exception recognized by the court of appeals is of no avail, because none of those exclusions can be justified on the ground that it will have only a de minimis effect on emissions. See pp. 16-19, *supra*. Without further review, the court of appeals' decision will cast a shadow over even those exclusions and long-settled expectations regarding the scope and coverage of the NSR and NSPS programs.

3. Finally, even aside from its effects on EPA's ability to tailor the NSR and NSPS programs to changed circumstances and policies, the court of appeals' decision poses a substantial threat to every regulatory agency entrusted with administering a statute that uses the word "any." The court of appeals stated that, aside from settings "in which the Supreme Court has required heightened standards of clarity to avoid upsetting fundamental policies," Pet. App. 8a, "when Congress places the word 'any' before a phrase with several common

meanings, the statutory phrase encompasses each of those meanings; the agency may not pick and choose among them," *id.* at 12a. Thus, although this Court has never used the mere presence of the word "any" in a statute to reject an agency's choice among several permissible meanings of the words that follow, and indeed took the opposite approach in *Chevron* itself, the court of appeals' reasoning threatens to eliminate all agency discretion whenever the word "any" appears before an ambiguous word or words in a statute.

It is entirely consistent with this Court's decisions, common sense, and the *Chevron* doctrine to acknowledge that the word "any" has a generally expansive meaning, while also acknowledging that it does not eliminate all statutory ambiguities that would otherwise be open to agency interpretation. As this Court's frequent cases construing statutes that use the word "any" underscore, the court of appeals' non-contextual interpretation of that term threatens agency authority in a broad range of areas. Further review is warranted to correct the court of appeals' failure to abide by the dictates of this Court's decision in *Chevron*, and to remedy the harms caused by its drastic and unjustifiable constriction of agency discretion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No.

In the Supreme Court of the United States

UNITED STATES ENVIRONMENT PROTECTION AGENCY, PETITIONER

v.

STATE OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 03-1380, 03-1381, 03-1383, 03-1390,
03-1402, 03-1453, 03-1454, 04-1029,04-1035, 04-1064,
05-1234, 05-1287

STATE OF NEW YORK, ET AL., PETITIONERS

V.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

CLEAN AIR IMPLEMENTATION PROJECT, ET AL.,
INTERVENORS

Argued Feb. 8, 2006.
Decided March 17, 2006.
Rehearing en Banc Denied June 30, 2006

Before: ROGERS, TATEL and BROWN, Circuit Judges.

Opinion for the Court filed by Circuit Judge ROGERS

ROGERS, Circuit Judge.

In *New York* v. *EPA*, 413 F.3d 3 (D.C. Cir. 2005) ("*New York I*"), the court addressed the first of two rules promulgated by the Environmental Protection Agency providing ways for stationary sources of air pollution to avoid triggering New Source Review ("NSR"). The court upheld in part and vacated in part the first rule. *Id.* at 10-11. We now address the second rule, the Equipment Replacement Provision ("ERP"), which amends the Routine Maintenance, Repair, and Replacement Exclusion ("RMRR") from NSR requirements. Under section 111(a)(4) of the Clean Air Act, 42 U.S.C. § 7411(a)(4), sources that undergo "any physical change" that increases emissions are required to undergo the NSR permitting process. *See also id.* §§ 7501(4), 7479(2)(C)(cross-referencing *id.* § 7411(a)(4)). The exclusion has historically provided that routine maintenance, repair, and replacement do not constitute changes triggering NSR. The ERP both defined and expanded that exclusion. EPA explained:

> [The] rule states categorically that the replacement of components with identical or functionally equivalent components that do not exceed 20% of the replacement value of the process unit and does not change its basic design parameters is not a change and is within the RMRR exclusion.

Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion, 68 Fed. Reg. 61,248, 61,270 (Oct. 27, 2003) ("Final Rule"); *see also* 70 Fed. Reg. 33,838 (June 10, 2005) ("Reconsideration"). Hence, the ERP would allow sources to avoid NSR when replacing equipment under the twenty-percent cap notwithstanding a resulting increase in emissions. The court stayed the effective date of the ERP on

December 24, 2003. We now vacate the ERP because it is contrary to the plain language of section 111(a)(4) of the Act.

The Clean Air Act requires new and modified sources of pollution to undergo NSR, a permitting process that imposes specific pollution control requirements depending upon the geographic location of the source.[1] Section 111(a)(4) of the Act describes when a source is to be considered "modified":

> The term "modification" means *any physical change* in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previous emitted.

42 U.S.C. § 7411(a)(4) (emphasis added). Since the inception of NSR, RMRR has been excluded from the definition of "modification." *See* 39 Fed. Reg. 42,510, 42,514 (Dec. 5, 1974); 43 Fed. Reg. 26,388, 26,403-04 (June 19, 1978). Heretofore, EPA applied the RMRR exclusion through "a case-by-case determination by

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[1] NSR consists of two programs: prevention of significant deterioration ("PSD") and nonattainment NSR. *See New York I*, 413 F.3d at 11-14. New and modified sources in attainment areas, i.e., where air quality standards have been met, and in unclassifiable areas are required to follow PSD rules, which means they must obtain a preconstruction permit, prove that the construction will not cause violations of certain air quality standards, and show that their operations are in compliance with the Best Available Control Technology ("BACT") requirements. *See* 42 U.S.C. § 7475. In nonattainment areas, i.e., where air quality standards have not been met, new and modified sources are required to obtain preconstruction permits, to offset emissions increases with emissions reductions from other sources in the area, and to install "lowest achievable emissions rate" technology ("LAER"). *See id.* § 7503.

weighing the nature, extent, purpose, frequency, and cost of the work as well as other factors to arrive at a common sense finding." 67 Fed. Reg. 80,290, 80,292-93 (Dec. 31, 2002). Consistent with *Alabama Power Co.* v. *Costle*, 636 F.2d 323 (D.C. Cir. 1979), which recognized EPA's discretion to exempt from NSR "some emission increases on grounds of *de minimis* or administrative necessity," *id.* at 400, EPA has for over two decades defined the RMRR exclusion as limited to "*de minimis* circumstances." 68 Fed. Reg. at 61,272. The ERP provides a bright-line rule and expands the traditional scope of the RMRR by exempting certain equipment replacements from NSR. *See*, e.g., 40 C.F.R. § 52.21(cc)(2005).[2]

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[2] The ERP provides:

> Without regard to other considerations, routine maintenance, repair and replacement includes, but is not limited to, the replacement of any component of a process unit with an identical or functionally equivalent component(s), and maintenance and repair activities that are part of the replacement activity, provided that all of the requirements in paragraphs (cc)(1) through (cc)(3)of this section are met.

40 C.F.R. § 52.21(cc). Paragraph (cc)(1) establishes that the fixed capital cost of the replacement component cannot exceed twenty percent of the replacement value of the process unit. Paragraph (cc)(2) states that the replacement cannot change the basic design parameters of the process unit. Paragraph (cc)(3) requires that the replacement activity not cause the process unit to exceed any independent, legally enforceable emission limitation. The ERP also amends 40 C.F.R. §§ 51.165, 51.166, and 52.24, but given the similarity of the sections, the court will follow the practice of the parties in citing only section 52.21.

The government and environmental petitioners contend that the ERP is contrary to the plain text of the Act because the statutory definition of "modification" applies unambiguously to any physical change that increases emissions, necessarily including the emission-increasing equipment replacements excused from NSR by the rule. They maintain that the word "any," when given its natural meaning, requires that the phrase "physical change" be read broadly, such that EPA's attempt to read "physical change" narrowly would relegate the word "any" to an insignificant role.

In evaluating the petitioners' contention, we proceed under the familiar two-part test of *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). If "Congress has directly spoken to the precise question at issue . . . that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43, 104 S. Ct. 2778. Only if the statute is silent or ambiguous do we defer to the agency's interpretation, asking "whether [it] is based on a permissible construction of the statute." *Id.* at 843, 104 S. Ct. 2778. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n. 9, 104 S. Ct. 2778.

The petitioners and EPA agree that the phrase "physical change" is susceptible to multiple meanings, each citing dictionary definitions. However, "the sort of ambiguity giving rise to *Chevron* deference 'is a creature not of definitional possibilities, but of statutory context.' "*American Bar Ass'n* v. *FTC*, 430 F.3d 457, 469 (D.C.

Cir. 2005) (quoting *Brown* v. *Gardner*, 513 U.S. 115, 118, 115 S. Ct. 552, 130 L.Ed.2d 462 (1994)); *see California Indep. Sys. Operator Corp.* v. *FERC*, 372 F.3d 395, 400 (D.C. Cir. 2004); *Cincinnati Ins. Co.* v. *Flanders Elec. Motor Serv., Inc.*, 40 F.3d 146, 152 (7th Cir. 1994). As the parties point out, the ordinary meaning of "physical change" includes activities that "make different in some particular," "make over to a radically different form," or "replace with another or others of the same kind or class." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 373 (1981). To say that it is "physical," in this context, indicates that the change must be "natural or material," rather than "mental, moral, spiritual, or imaginary." *Id.* 1706. The parties agree that in "[r]eal-world, common-sense usage," 68 Fed. Reg. at 61,271, "physical change" includes equipment replacements. They further agree that the ERP would excuse from NSR requirements certain emission-increasing activities that EPA has historically considered to be "physical changes." *See id.* at 61,270.

The parties' essential disagreement, then, centers on the effect of Congress's decision in defining "modification" to insert the word "any" before "physical change." According to the petitioners, the word "any" means that the phrase "physical change" covers any activity at a source that could be considered a physical change that increases emissions. According to EPA, "any" does nothing to resolve ambiguity in the phrase it modifies. EPA maintains that because "physical change" is "susceptible to multiple meanings," *id.* at 61,271, "identifying activities that are 'changes' for NSR purposes . . . requires an exercise of Agency expertise," "the classic situation in which an agency is accorded deference under *Chevron*," *id.* at 61,272. Under this approach, once

EPA has identified an activity as a "physical change," the word "any" requires that the activity be subject to NSR. We conclude that the differences between the parties' interpretations of the role of the word "any" are resolved by recognizing that "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind,'" *United States* v. *Gonzales*, 520 U.S. 1, 5, 117 S. Ct. 1032, 137 L.Ed.2d 132 (1997), and that courts must give effect to each word of a statute, *see, e.g.*, *TRW, Inc.* v. *Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L.Ed.2d 339 (2001). Because Congress used the word "any," EPA must apply NSR whenever a source conducts an emission-increasing activity that fits within one of the ordinary meanings of "physical change."

In a series of cases, the Supreme Court has drawn upon the word "any" to give the word it modifies an "expansive meaning" when there is "no reason to contravene the clause's obvious meaning." *Norfolk S. Rwy. Co.* v. *Kirby*, 543 U.S. 14, 31-32, 125 S. Ct. 385, 160 L.Ed.2d 283 (2004); *see also Dep't of Hous. and Urban Dev.* v. *Rucker*, 535 U.S. 125, 130-31, 122 S. Ct. 1230, 152 L.Ed.2d 258 (2002); *Gonzales*, 520 U.S. at 5, 117 S. Ct. 1032. Indeed, the Court has read the word "any" to signal expansive reach when construing the Clean Air Act. In *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 100 S. Ct. 1889, 64 L.Ed.2d 525 (1980), the Court resolved a jurisdictional dispute under section 307(b)(1) by interpreting the phrase "any other final action," which the Court "discern[ed to have] no uncertainty." *Id.* at 588, 100 S. Ct. 1889. The Court never suggested that the term "final action" was itself devoid of multiple meanings depending on the context, but rather stated that when Congress amended the Act in

1977, "it expanded its ambit to include not simply "other final action,' but rather "*any* other final action.'" *Id.* at 589, 100 S. Ct. 1889. "[I]n the absence of legislative history to the contrary," the Court held that the statutory phrase "must be construed to mean exactly what it says, namely, *any other* final action." *Id.*

Although EPA is correct that the meaning of "any" can differ depending upon the statutory setting, *see Nixon* v. *Missouri Mun. League*, 541 U.S. 125, 132, 124 S. Ct. 1555, 158 L.Ed.2d 291 (2004), the context of the Clean Air Act warrants no departure from the word's customary effect. Unlike *Nixon*, the question of statutory interpretation here does not arise in a setting in which the Supreme Court has required heightened standards of clarity to avoid upsetting fundamental policies. *See id.* at 132-33, 140-41, 124 S. Ct. 1555 (citing *Gregory* v. *Ashcroft*, 501 U.S. 452, 111 S. Ct. 2395, 115 L.Ed.2d 410 (1991)). EPA points to no "strange and indeterminate results," *id.* at 133, 124 S. Ct. 1555 that would emerge from adopting the natural meaning of "any" in section 111(a)(4) of the Act. Given Congress's goal in adopting the 1977 amendments of establishing a balance between economic and environmental interests, see *Wisconsin Elec. Power Co.* v. *Reilly*, 893 F.2d 901, 909-10 (7th Cir. 1990) ("*WEPCo*"), it is hardly "farfetched," *Nixon*, 541 U.S. at 138, 124 S. Ct. 1555, for Congress to have intended NSR to apply to any type of physical change that increases emissions. In this context, there is no reason the usual tools of statutory construction should not apply and hence no reason why "any" should not mean "any." Indeed, EPA's interpretation would produce a "strange," if not an "indeterminate," result: a law intended to limit increases in air pollution would allow sources operating below applicable emission limits

to increase significantly the pollution they emit without government review.

Even without specific reliance on the effect of "any," this court has construed the definition of "modification" broadly. In *Alabama Power,* the court explained that "the term 'modification' [in section 111(a)(4)] is nowhere limited to physical changes exceeding a certain magnitude." 636 F.2d at 400. Although the legislative history indicated that one Senator intended the term to apply only to "major expansion program[s]," *id.* at 400 n.47, the court observed that "the language of the statute clearly did not enact such limit into law," *id.* at 400. The court further observed that "[i]mplementation of the statute's definition of 'modification' will undoubtedly prove inconvenient and costly to affected industries; but the clear language of the statute unavoidably imposes these costs except for *de minimis* increases." *Id.* More recently, in *New York I*, the court looked to the plain meaning of section 111(a)(4) and the absence of contrary legislative history in holding that even pollution control projects constituted "physical changes." *New York I*, 413 F.3d at 40-42. Likewise, the Seventh Circuit concluded in *WEPCo* that the purposes of the 1977 amendments to the Act required an expansive reading of the plain language of section 111(a)(4). See *WEPCo*, 893 F.2d at 908-10.

EPA's attempt to avoid the persuasive force of these decisions and to find ambiguity in the phrase "any physical change" fails for a variety of reasons. Even assuming that the decisions construing section 111(a)(4) are not "judicial precedent holding that the statute unambiguously forecloses the agency's interpretation," *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*,

--- U.S. ----, ----, 125 S. Ct. 2688, 2700, 162 L.Ed.2d 820 (2005), *Brand X*, on which EPA principally relies, does not drain those decisions of all precedential value. The fact that previous judicial interpretations of section 111(a)(4) have all reached the conclusion that the text must be read broadly supports the petitioner's argument at Chevron step one, particularly because those decisions--both before and after *Chevron*--used language indicating the text was "clear" and "plain." *See New York I*, 413 F.3d at 40; *WEPCo*, 893 F.2d at 907; *Alabama Power*, 636 F.2d at 400.

Even in the absence of such precedent, EPA's approach to interpreting "physical change," as well as a similar approach by industry intervenors that focuses on the thirty-nine words following "any," contravenes several rules of statutory interpretation. EPA's position is that the word "any" does not affect the expansiveness of the phrase "physical change"; it only means that, once the agency defines "change" as broadly or as narrowly as it deems appropriate, everything in the agency-defined category is subject to NSR. To begin, that reading, contrary to "a cardinal principle of statutory construction," would make Congress's use of the word "any" "insignificant" if not "superfluous." *TRW*, 534 U.S. at 31, 122 S. Ct. 441 (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L.Ed.2d 251 (2001)). Reading the definition in this way makes the definition function as if the word "any" had been excised from section 111(a)(4); there is virtually no role for "any" to play. Additionally, the approaches of EPA and industry would require Congress to spell out all the applications covered by a definition before a court could conclude that Congress had directly spoken regarding a particular application, ignoring the fact that a definition, like a

general rule, need not list everything it covers. *See National Public Radio, Inc.* v. *FCC*, 254 F.3d 226, 229 (D.C. Cir. 2001); *see also Shays* v. *FEC*, 414 F.3d 76, 108 (D.C. Cir. 2005). EPA's approach would ostensibly require that the definition of "modification" include a phrase such as "regardless of size, cost, frequency, effect," or other distinguishing characteristic. Only in a Humpty Dumpty world[3] would Congress be required to use superfluous words while an agency could ignore an expansive word that Congress did use. We decline to adopt such a world-view.

In contrast, the petitioners' approach, by adopting an expansive reading of the phrase "any physical change," gives natural effect to all the words used by Congress and reflects both their common meanings and Congress's purpose in enacting the 1970 and 1977 amendments. *See New York I*, 413 F.3d at 11-13; *WEPCo*, 893 F.2d at 909. To improve pollution control programs in a manner consistent with the balance struck by Congress in 1977 between "the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality," *Chevron*, 467 U.S. at 851, 104 S. Ct. 2778, Congress defined the phrase "physical change" in terms of increases in emissions. After using the word "any" to indicate that "physical change" covered all such activities, and was not left to agency interpretation, Congress limited the scope of "any physical change" to changes that "increase [ ] the amount of any air pollutant emitted by such source or which result [ ] in the emission of any air pollutant not

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[3] See *TVA* v. *Hill*, 437 U.S. 153, 173 n.18, 98 S. Ct. 2279, 57 L.Ed.2d 117 (1978) (quoting *Through the Looking Glass*, in THE COMPLETE WORKS OF LEWIS CARROLL 196 (1939)).

previously emitted." 42 U.S.C. § 7411(a)(4). Thus, only physical changes that do not result in emission increases are excused from NSR. Because Congress expressly included one limitation, the court must presume that Congress acted "intentionally and purposely," *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 452, 122 S. Ct. 941, 151 L.Ed.2d 908 (2002) (quoting *Russello* v. *United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L.Ed.2d 17 (1983)), when it did not include others. *Cf. New York I*, 413 F.3d at 39. So construed, each word in the phrase "any physical change" has a meaning consonant with congressional intent and the scope of the definitional phrase is limited only by Congress's determination that such changes be linked to emission increases.

The expansiveness of the petitioners' approach does not leave the definition of "any physical change" without limits. The modifier "any" cannot bring an activity that is never considered a "physical change" in ordinary usage within the ambit of NSR. But when Congress places the word "any" before a phrase with several common meanings, the statutory phrase encompasses each of those meanings; the agency may not pick and choose among them. EPA, through its historical practice and its words, has acknowledged that the equipment replacements covered by the ERP are "physical changes" under one of the ordinary meanings of the phrase. *See* 68 Fed.Reg. at 61,271-72. EPA may not choose to exclude that "[r]eal-world, common-sense usage of the word 'change.'" *Id.* at 61,271. Moreover, a physical change is not the sole criterion for triggering NSR under the definition of "modification." The expansive meaning of "any physical change" is strictly limited by the requirement

that the change increase emissions. *See* 42 U.S.C. § 7411(a)(4).[4]

The fact that EPA, through the RMRR exclusion, has historically interpreted "any physical change" to exclude changes of trivial regulatory concern on a *de minimis* rationale, *see Alabama Power*, 636 F.2d at 360-61, does not demonstrate that the meaning of "physical change" is ambiguous. Rather, it reflects an agency's inherent power to overlook "trifling matters," *id.* at 360, a "principle [that] is a cousin of the doctrine that, notwithstanding the 'plain meaning' of a statute, a court must look beyond the words to the purpose of the act where its literal terms lead to 'absurd or futile results,'" *id.* at 360 n.89 (citations omitted). As the Supreme Court has instructed, "the venerable maxim *de minimis non curat lex* ('the law cares not for trifles') is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept." *Wisconsin Dep't of Revenue* v. *William Wrigley, Jr., Co.*, 505 U.S. 214, 231, 112 S. Ct. 2447, 120 L.Ed.2d 174 (1992). Reliance on the *de minimis* doctrine invokes congressional intent that agencies diverge from the plain meaning of a statute only so far as is necessary to avoid its futile application. Thus, the court in *Alabama Power* acknowledged that "EPA does have discretion, in administering the statute's 'modification' provision, to exempt from PSD review some emission increases on grounds of *de minimis* or administrative necessity." 636

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[4] The court has no occasion to decide whether part replacements or repairs necessarily constitute a "modification" under the definition taken as a whole.

F.2d at 400. As applied, the court explained that *de minimis* standards served to alleviate "severe" administrative and economic burdens by lifting requirements on "minuscule" emission increases. *See id.* at 405. While the court today expresses no opinion regarding EPA's application of the *de minimis* exception, given the limits on the scope of the *de minimis* doctrine, *see Shays*, 414 F.3d at 113-14, EPA appropriately has not attempted to justify the ERP as an exercise of *de minimis* discretion. As EPA has disclaimed the assertion that its prior expansive interpretations of "any physical change" were "absurd or futile," 70 Fed.Reg. at 33,842, it is in no position to claim that the ERP is necessary to avoid absurdity.

EPA's remaining arguments also fail to demonstrate that the phrase "any physical change" is ambiguous. The fact that the court concluded that the word "increases" in section 111(a)(4) is ambiguous, *see New York I*, 413 F.3d at 23, does not suggest that the phrase "any physical change" is also ambiguous; unlike the latter, the former is unaccompanied by a qualifier signaling Congress's intent. Congress's use of the word "increases" necessitated further definition regarding rate and measurement for the term to have any contextual meaning. No such further definition of "physical change" is required because Congress's use of the word "any" indicates the intent to cover all of the ordinary meanings of the phrase, as evidenced by EPA's decades-long understanding and practice. Also, because the court in *New York I* rejected industry's contention that Congress ratified the New Source Performance Standards ("NSPS") regulations on "modification" in the 1977 amendments, *see id.* at 19-20, EPA's reliance on its NSPS regulations to demonstrate the ambiguity of "any

physical change" is unavailing. As discussed, the early emergence of a RMRR exclusion based on a *de minimis* rationale does not blur the clarity of the phrase "any physical change." To the extent industry intervenors rely on the NSPS regime to reargue their position that "modifications" require an increase in maximum emission rates, that issue was resolved in *New York I*, 413 F.3d at 19-20, 40; *see also New York* v. *EPA*, 431 F.3d 801, 802-03 (D.C. Cir. 2005) (Williams, J., concurring in denial of rehearing), and is irrelevant because it does not address what constitutes a "physical change."

"Therefore, for EPA to avoid a literal interpretation at *Chevron* step one, it must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it." *Engine Mfrs. Ass'n* v. *EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996). The discussion in *New York I*, 413 F.3d at 12-13, and *WEPCo*, 893 F.2d at 909 (quoting H.R. REP. No. 95-294, at 211, (1977), *as reprinted* in 1977 U.S.C.C.A.N. 1077, 1290), of Congress's basic goals in enacting the 1977 amendments—to intensify the war against air pollution, to establish a permit program that struck a balance between economic and environmental interests, and to stimulate technology to control pollution—demonstrate the futility of EPA's endeavor. EPA cannot show that historical fact prevents a broad reading of "any physical change" inasmuch as EPA for decades has interpreted that phrase to mean "virtually all changes, even trivial ones, . . . generally interpret[ing] the [RMRR] exclusion as being limited to *de minimis* circumstances." 68 Fed.Reg. at 61,272.

As for logic, EPA cannot show any incoherence in Congress requiring NSR for equipment replacements that increase emissions while allowing replacements that do not increase emissions to avoid NSR. EPA acknowledges the reasonableness of its past expansive interpretation of "any physical change." *See id.*; 70 Fed Reg. at 33,842; Respondent's Br. at 29. To the extent that EPA relies on the argument that allowing ERP projects has the potential to lower overall emissions through increased efficiency even if emissions increase at a source, the court in *New York I* rejected EPA's similar argument in support of an exemption from NSR for pollution control projects. The court stated that "Congress could reasonably conclude, for example, that tradeoffs between pollutants are difficult to measure, and thus any significant increase in emissions of any pollutant should be subject to NSR." *New York I*, 413 F.3d at 41. Absent a showing that the policy demanded by the text borders on the irrational, EPA may not "avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy." *Engine Mfrs.*, 88 F.3d at 1089.

Likewise, EPA offers no reason to conclude that the structure of the Act supports the conclusion that "any physical change" does not mean what it says. EPA does not address the Act's structure except in defending the reasonableness of the ERP as a policy choice. In that context, EPA points to the Act's "many other systematic air programs," particularly "model market-based programs," as support for its view that economic and environmental interests can be effectively balanced while limiting the application of NSR to existing sources. *See* 70 Fed. Reg. at 33,844. Although EPA might prefer

market-based methods of controlling pollution, Congress has chosen a different course with NSR.

Accordingly, we hold that the ERP violates section 111(a)(4) of the Clean Air Act in two respects. First, Congress's use of the word "any" in defining a "modification" means that all types of "physical changes" are covered. Although the phrase "physical change" is susceptible to multiple meanings, the word "any" makes clear that activities within each of the common meanings of the phrase are subject to NSR when the activity results in an emission increase. As Congress limited the broad meaning of "any physical change," directing that only changes that increase emissions will trigger NSR, no other limitation (other than to avoid absurd results) can be implied. The definition of "modification," therefore, does not include only physical changes that are costly or major. Second, Congress defined "modification" in terms of emission increases, but the ERP would allow equipment replacements resulting in non-*de minimis* emission increases to avoid NSR. Therefore, because it violates the Act, we vacate the ERP.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1380

CONSOLIDATED WITH 03-1381, 03-1383, 03-1390, 03-1402, 03-1453, 03-1454, 04-1029, 04-1035, 04-1064, 05-1234, 05-1287

September Term, 2005

STATE OF NEW YORK, ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

CLEAN AIR IMPLEMENTATION PROJECT, ET AL.,
INTERVENORS

[Filed On: June 30, 2006]

Before: ROGERS, TATEL, and BROWN, Circuit Judges.

ORDER

Upon consideration of respondent's petition for rehearing filed May 1, 2006, it is

ORDERED that the petition be denied.

PER CURIAM

FOR THE COURT:
MARK J. LANGER, clerk

BY:
MICHAEL C. McGRAIL
Deputy clerk

* Circuit Judge Kavanaugh did not participate in this matter.

APPENDIX C

RULES AND REGULATIONS
ENVIRONMENTAL PROTECTION AGENCY
40 CFR Parts 51 and 52

[FRL-7575-9; RIN 2060-AK28; Electronic Docket OAR-2002-0068; Legacy Docket A-2002-04]

Prevention of Significant Deterioration (PSD) and Non-Attainment New Source

Review (NSR): Equipment Replacement Provision of the Routine Maintenance,

Repair and Replacement Exclusion

[Monday, October 27, 2003]

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is finalizing revisions to the regulations governing the NSR programs mandated by parts C and D of title I of the Clean Air Act (CAA). Today's changes reflect EPA's incorporation of comments from the proposed rule for "Prevention of Significant Deterioration (PSD) and Non-attainment New Source

Review (NSR): Routine Maintenance, Repair and Replacement." These changes provide a category of equipment replacement activities that are not subject to Major NSR requirements under the routine maintenance, repair and replacement (RMRR) exclusion. The changes are intended to provide greater regulatory certainty without sacrificing the current level of environmental protection and benefit derived from the NSR program. We believe that these changes will facilitate the safe, efficient, and reliable operation of affected facilities.

EFFECTIVE DATE: This final rule is effective on December 26, 2003.

ADDRESSES: *Docket.* Docket No. A-2002-04 (Electronic docket OAR-2002-0068), containing supporting information used to develop the proposed rule and today's final rule, is available for public inspection and copying between 8:00 a.m. and 4:30 p.m., Monday through Friday (except government holidays) at the Air and Radiation Docket and Information Center (6102T), Room B-108, EPA West Building, 1301 Constitution Avenue, NW, Washington, D.C. 20460; telephone (202) 566-1742, fax (202) 566-1741. A reasonable fee may be charged for copying docket materials.

Worldwide Web (WWW). In addition to being available in the docket, an electronic copy of this final rule will also be available on the *WWW* through the Technology Transfer Network (TTN). Following signature, a copy of the rule will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules: *http://www.epa.gov/ttn/oarpg.*

FOR FURTHER INFORMATION CONTACT: Mr. Dave Svendsgaard, Information Transfer and Program Integration Division (C339-03), U.S. EPA Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina 27711, telephone 919-541- 2380, or electronic mail at *svendsgaard.dave@epa.gov*, for questions on this rule.

SUPPLEMENTARY INFORMATION:

Regulated Entities

Entities potentially affected by this final action include sources in all industry groups. The majority of sources potentially affected are expected to be in the following groups:

Industry group	SIC [a]	NAICS [b]
Electric Services	491	221111, 221112, 221113, 2211119, 221122, 2211121,
Petroleum Refining	291	324110
Industrial Inorganic Chemicals	281	325181, 325120, 325131, 325182, 211112, 325998, 331311, 25188
Industrial Organic Chemicals	286	325110, 325132, 325192, 325188, 325193, 325120, 325199

Miscellaneous Chemical Products	289	325520,	325920,	325910,	325182, 325510
Natural Gas Liquids	132	211112			
Natural Gas Transport	492	486210,	221210		
Pulp and Paper Mills	261	322110,	322121,	322122,	322130
Paper Mills	262	322121,	322122		
Automobile Manufacturing	371	336111,	336112,	336211,	336992,
		336322,	336312,	336330	336340,
		336350,	336399,	336212	336213
Pharmaceuticals	283	325411,	325412,	325413,	325414

FNa Standard Industrial Classification.

FNb North American Industry Classification System.

Entities potentially affected by this final action also include State, local, and tribal governments that are delegated authority to implement these regulations.

Outline

The information presented in this preamble is organized as follows:

I. General Information

A. How can I get copies of this document and other related information?

1. Docket

2. Electronic Access

B. Where can I obtain additional information?

II. Background

A. What is the RMRR exclusion?

B. Issues surrounding the RMRR exclusion

C. Process used to develop this rule

D. What we proposed

III. Equipment Replacement Provision

A. Overview and justification for today's final action

B. What is an identical or functionally equivalent replacement and why should such an activity be considered RMRR?

C. What cost limit has been placed on the equipment replacement approach?

D. What will be the basis of applying the 20-percent threshold?

E. What basic design parameters are being established to qualify for the equipment replacement provision?

F. What collection of equipment should be considered in applying the equipment replacement provision and how should it be defined?

G. Consideration of non-emitting units as part of the process unit

H. What is the accounting basis for the process unit?

I. Enforcement

1. Compliance assurance

2. General issues

J. Quantitative Analysis

K. Consideration of other options

1. Annual Maintenance, repair and replacement allowance

2. Capacity-based option

3. Age-based option

L. Specific list of excluded activities

M. Stand-alone exclusion for energy efficiency projects

N. Legal Basis

1. How does the NSR program address existing sources and why is today's rule consistent with this approach?

2. Why today's rule appropriately implements the Clean Air Act's definition of modification

IV. Administrative Requirements for This Rule

A. Executive Order 12866—Regulatory Planning and Review

B. Executive Order 13132—Federalism

C. Executive Order 13175—Consultation and Coordination with Indian Tribal Governments

D. Executive Order 13045—Protection of Children from Environmental Health Risks and Safety Risks

E. Paperwork Reduction Act

F. Regulatory Flexibility Analysis

G. Unfunded Mandates Reform Act of 1995

H. National Technology Transfer and Advancement Act of 1995

I. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

J. Executive Order 12988—Civil Justice Reform

V. Effective Date for Today's Requirements

VI. Statutory Authority

I. General Information

A. *How Can I Get Copies of This Document and Other Related Information?*

1. *Docket.* The EPA has established an official public docket for this action under Docket ID No. A-2002-04. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the EPA Docket Center, (Air Docket), U.S. Environmental Protection Agency, 1301 Constitution Ave., NW., Room: B108, Mail Code: 6102T, Washington, DC, 20004. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566-1742. A reasonable fee may be charged for copying.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/.*

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once

in the system, select "search," then key in the appropriate docket identification number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in section I.A.1. of this preamble. The EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For additional information about EPA's electronic public docket visit EPA Dockets online or see 67 FR 38102, May 31, 2002.

B. *Where Can I Obtain Additional Information?*

In addition to being available in the docket, an electronic copy of today's final rule is also available on the WWW through the Technology Transfer Network (TTN). Following signature by the EPA Administrator, a copy of this rule will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at *http://www.epa.gov/ttn/oarpg*. The TTN provides information and technology exchange in various areas of air pollution control. If more information regarding the TTN is needed, call the TTN HELP line at (919) 541-5384.

II. Background

A. *What Is the RMRR Exclusion?*

Title I of the Clean Air Act (CAA) established the New Source Review program[1] to help control airborne emissions from major new stationary sources of pollution. Under the program, anyone who seeks to construct a new stationary source that will be a major source of regulated pollutants must obtain a permit from State authorities (or, where a State has not established its own program, from EPA directly) before beginning construction of the source. In order to obtain the permit, the owner or operator must, among other things, demonstrate that the new source will have state-of-the-art pollution control devices.

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[1] We broadly use the term "New Source Review," or NSR, to encompass both the PSD and the Non-attainment New Source Review program.

The NSR program does not generally affect existing sources, but it does apply if they undergo a "modification." The NSR provisions of the CAA do not create their own definition of "modification," instead borrowing the definition of the term established by section 111 of the CAA, which defined the term for purposes of the New Source Performance Standards (NSPS) program. That definition states that "[t]he term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." Under 40 CFR parts 51 and 52, the rules we have promulgated to carry out the NSR program, "major modification" is similarly defined as any physical change in or change in the method of operation of a major stationary source that would result in: (1) A significant emissions increase of a regulated NSR pollutant; and (2) a significant net emissions increase of that pollutant from the major stationary source.[2] The regulations further provide that certain activities do not constitute a "physical change or change in the method of operation" under the definition of "major modification." One category of such activities is routine maintenance, repair and replacement (RMRR). The regulatory provisions excluding RMRR from the definition of change constitute the RMRR exclusion.

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[2] Once a modification is determined to be major, NSR requirements apply only to those specific pollutants for which there would be a significant net emissions increase.

B. *Issues Surrounding the RMRR Exclusion*

Until today, the NSR regulations have not further specified what types of activities are encompassed by the term RMRR. Heretofore, we have applied the RMRR exclusion exclusively on a case-by-case basis using a multi-factor test for determining whether a particular activity falls within or outside the exclusion. We have made these case-by-case determinations both in the context of applicability determinations, where a source or permitting authority has requested EPA's guidance concerning whether a particular activity falls within the exclusion or requires a permit, and in the context of enforcement actions, where we have challenged an activity undertaken by a source after the fact and the source has asserted that the activity was permissible under the exclusion.

This case-by-case approach has been praised for its flexibility, but criticized for hampering activities important to assuring the safe, reliable and efficient operation of existing plants. Specifically, some of the case-by-case determinations we have made, particularly over the past decade, and particularly in a series of enforcement actions, have been criticized for giving the exclusion a narrow scope that disallows replacement of significant plant components with identical or functionally equivalent components. Critics argue that the effect is to discourage plant owners or operators from engaging in replacements that are important to restoring, maintaining and improving plant safety, reliability, and efficiency. They further argue that this effect is exacerbated by what they assert are the uncertainties inherent in the case-by-case approach.

To elaborate on the uncertainty issues: Unless an owner or operator seeks an applicability determination from his or her reviewing authority, it can be difficult for the owner or operator to know with reasonable certainty whether a particular activity constitutes RMRR. This gives the owner or operator five choices, two of which the owner or operator is not likely to select, and the other three of which have significant drawbacks for the productivity of the plant.

First, the owner or operator may simply seek an NSR permit. That course, however, is likely to be time-consuming and expensive, since it will likely result in a requirement to retrofit an existing plant with state-of-the-art pollution controls which often is very costly and can present significant technical challenges. Therefore, an owner or operator is not likely to select this option if it can be avoided.

Second, the owner or operator may proceed at risk without a reviewing authority determination. That option, however, is also not likely to be attractive where a significant replacement activity is involved, because if the owner or operator proceeds without a reviewing authority determination and if we later find that he or she made an incorrect determination on its own, the owner or operator faces potentially serious enforcement consequences. Those consequences could well include substantial fines (along with the further consequences of having been determined to be in violation of the CAA) and penalties and a requirement to install the state-of-the-art pollution controls, even though those controls present technical issues or represent a significant enough expenditure that they likely would have deterred

the owner or operator from seeking a permit in the first place. The owner or operator is not likely to take this risk if he or she believes there is a high probability of these kinds of consequences and if he or she has other options.

Third, the owner or operator may seek an applicability determination. That process, too, is time-consuming and expensive, albeit typically less so than seeking a permit. This path presents a potentially significant barrier to today's global, quick-to-market industries, such as computer chips, pharmaceuticals, and autos. This approach also is likely to result in substantial foregone activities that would enhance the safety, reliability and efficiency of the plant while awaiting the applicability determination.

Fourth, the owner or operator may forego or curtail replacements that would enhance the safe, reliable, or efficient operation of its plant, instead opting to repair existing components even though they are inferior to current day replacements because they likely have deteriorated with use and probably are less advanced and less efficient than current technology. Foregoing the replacement activities altogether will reduce plant safety, reliability and efficiency; curtailing or postponing them does as well, differing only in the degree of these effects.

Finally, the owner or operator may curtail the plant's productive capacity by replacing components with less than the best technology in order to be more certain that the replacement is within the RMRR regulatory bounds, or he or she may agree to limit the source's hours of operation or capacity or install less than state-of-the-art

air pollution controls to ensure no increase in emissions. Either of those courses, however, will also result in loss of plant productivity.

The uncertainties are also problematic for State and local reviewing authorities. They require those authorities to devote scarce resources to make complex determinations, including applicability determinations, and consult with other agencies to ensure that any determinations are consistent with determinations made for similar circumstances in other jurisdictions and/or that other reviewing authorities would concur with the conclusion.

Industry commenters strongly echoed these concerns, asserting that the expense and delay associated with NSR scrutiny, whether or not the activity is ultimately judged to be subject to major NSR, have caused a number of facilities to forego needed and beneficial maintenance, repair, and replacement activities, including ones that would likely have reduced emissions. In our June 2002 report to the President, we similarly concluded that the NSR program has impeded or resulted in the cancellation of projects that would have maintained and improved the reliability, efficiency, or safety of existing energy capacity.

We are persuaded that we should change the approach to the RMRR exclusion that we have been following for equipment replacements. The approach we have been taking often has not encompassed the replacement of existing components with identical or similar new components that serve the same function, that represent a small fraction of the value of the process unit of which

they are a part, that do not change the process unit's basic design parameters, and that do not cause the process unit to exceed any emission limitations. For the reasons noted above, this approach tends to have the effect of leading sources to refrain from replacing components, to replace them with inferior components, or to artificially constrain production in other ways. We are persuaded that none of these outcomes advanced the central policy of the major NSR program as applied to existing sources, which is not to cut back on emissions from existing major stationary sources through limitations on their productive capacity, but rather to ensure that they will install state-of-the-art pollution controls at a juncture where it otherwise makes sense to do so. We also do not believe the outcomes produced by the approach we have been taking have significant environmental benefits compared with the approach we are adopting today and, indeed, we believe our new approach may well produce environmental improvements as compared to the old one.

We are also persuaded that uncertainties surrounding the scope of the exclusion that are associated with the case-by-case approach tend to exacerbate the problem outlined above. These uncertainties can discourage replacements that would promote safety, reliability and efficiency even in instances where, if the matter were brought to EPA, we would determine that the replacement in question was RMRR. Such discouragement results in lost capacity and lost opportunities to improve energy efficiency and reduce air pollution.

We believe that these problems will be significantly reduced by the rule we are adopting today. This rule

specifies that the replacement of components of a process unit with identical components or their functional equivalents will come within the scope of the exclusion, provided the cost of replacing the component falls below 20 percent of the replacement value of the process unit of which the component is a part, the replacement does not change the unit's basic design parameters, and the unit continues to meet enforceable emission and operational limitations.

Our new equipment replacement approach will allow owners or operators to replace components under a wider variety of circumstances than they have been able to do under our prior RMRR approach. It also provides more certainty both to source owners or operators who will be able better to plan activities at their facilities, and to reviewing authorities who will be able better to focus resources on other areas of their environmental programs rather than on time-consuming RMRR determinations. The effect should be to remove disincentives to undertaking RMRR activities falling within the rule, thereby enhancing key operational elements such as efficiency, safety, reliability, and environmental performance. For example, we anticipate that improved safety and reliability will result in more stable process operations and reduce periods of startup, shutdown, and malfunction and the increased emissions usually associated with them. Accordingly, we believe the rule will promote the central purpose of Title I of the CAA, "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." CAA section 101.

We note that we continue to believe that our prior narrower and entirely case-by-case approach to the RMRR exclusion was consistent with the relevant language of the CAA and a reasonable effort to effectuate its policies. At the same time, we also believe that the final rule's categorical exclusion of certain replacement activities and the broader definition of RMRR on which that exclusion is premised are likewise consistent with the statute's language and represent a better accommodation of the statute's twofold ends. We therefore have decided to adopt the final rule.

C. *Process Used To Develop This Rule*

In the 1992 "WEPCO Rule" preamble, we declared our intent to issue guidance on the subject of RMRR. In 1994, as an outgrowth of meetings with the Clean Air Act Advisory Committee, we developed, for discussion purposes only, a preliminary draft that presented possible ways of how RMRR could be defined. We received a substantial volume of comments on this document. We subsequently decided not to include this preliminary draft approach in our 1996 NSR proposed rulemaking.

In 2001, the President's National Energy Policy directed EPA in consultation with the Department of Energy (DOE) and other Federal agencies to review the impact of NSR on investment in new utility and refinery generation capacity, energy efficiency and environmental protection. Our Report to the President illustrated the problems associated with our prior case-by-case approach to identifying RMRR activities and underscored the advantages of establishing an objective bright-line approach for administering the RMRR provision.

We held conference calls with various stakeholders during October 2001 (including representatives from industry, State and local governments, and environmental groups) to discuss new ideas that were raised as to how the RMRR provision might be improved. The proposed RMRR rule reflected many of the ideas discussed in those meetings. Today's final rule on the equipment replacement provision is based on careful consideration of comments received on the proposed RMRR rule (67 FR 80920, December 31, 2002), where we sought comment on all aspects of our proposed approaches. Today's rule represents final action on only one part of what we proposed in December 2002—the equipment replacement provision. We have decided, for now, not to take final action on the proposed annual maintenance, repair and replacement allowance approach.

D. *What We Proposed*

The RMRR proposal offered for comment two cost-based approaches for determining what constitutes routine maintenance, repair, and replacement. Under the proposal, facilities could have relied on a facility-wide annual maintenance, repair and replacement allowance and/or an equipment replacement cost threshold to determine whether major NSR requirements were triggered by performing plant maintenance, repair and replacement activities. The proposal additionally outlined two options based on the capacity and age of a facility. We solicited comment on all aspects of the proposed approaches as well as any other viable option for clarifying the term "routine maintenance, repair, and replacement." We took public comment on the proposed rule

until May 2, 2003—120 days following publication in the **Federal Register**.

Under the "annual maintenance, repair and replacement allowance," an annual maintenance cost allowance would be established for each industrial facility based on an industry-specific percentage. For the percentage, we considered using the Internal Revenue Service "Annual Asset Guideline Repair Allowance Percentages" (AAGRAP), which for years has been used as an integral part of an exclusion under the New Source Performance Standard (NSPS) program. A multi-year allowance approach, in addition to the annual approach, was also offered for consideration in the proposal.

Safeguards were proposed to ensure that the types of activities undertaken under the annual allowance are not activities that should be subject to greater scrutiny. These safeguards include: (1) No new unit may be installed; (2) no unit may be replaced in its entirety; and (3) changes may not cause an increase in the short-term emission rate of any regulated NSR pollutant.

Under the "equipment replacement provision," or ERP, we proposed to streamline the process for determining if major NSR permitting requirements apply to replacement of existing equipment with identical new equipment or with functionally equivalent equipment. Per-replacement-of-component(s) thresholds, potentially up to 50 percent of the cost of replacing the process unit, were suggested by the proposal. As long as the threshold was not exceeded and the basic design

parameters remained unchanged, the activity would be considered RMRR under this approach.

Under the proposal, all activities that fell within the annual maintenance, repair and replacement allowance or the equipment replacement threshold and that met all the other criteria for these provisions would be considered RMRR without further review. Activities that were unable to be accommodated under the annual maintenance, repair and replacement allowance or the equipment replacement threshold could still qualify for the RMRR exclusion after a case-by-case review in accordance with current rules.

We solicited comments on all aspects of our RMRR proposal.

III. Equipment Replacement Provision

A. *Overview and Justification for Today's Final Action*

Today, we are revising certain provisions of the major NSR program by finalizing the equipment replacement provision (ERP) to specify activities that will automatically qualify for the RMRR exclusion. This rule is effective on December 26, 2003. At this time, we are not taking action on our proposed annual maintenance, repair and replacement allowance approach.

Although many commenters requested that we further clarify the case-by-case approach for determining whether an activity is RMRR, we are not taking action on this suggestion at this time. We are still considering what, if any, changes should be made to that policy. In

the meantime, the case-by-case approach will remain available for the owner or operator of a source to use as an alternative and/or supplement to today's ERP.

Under today's rule, an activity (or aggregations of activities) can qualify for the ERP if: (1) It involves replacement of any existing component(s)[3] of a process unit with component(s) that are identical or that serve the same purpose as the replaced component(s); (2) the fixed capital cost of the replaced component(s), plus costs of any activities that are part of the replacement activity (*e.g.*, labor, contract services, major equipment rental, and associated repair and maintenance activities),[4] does not exceed 20 percent of the current replacement value of the process unit; and (3) the replacement(s) does not alter the basic design parameters of the process unit or cause the process unit to exceed any emission limitation or operational limitation (that has the effect of constraining emissions) that applies to any component of the process unit and that is legally enforceable.

Today's final rule specifies the procedures by which the owner or operator of a source selects the basic design parameters for steam electric generating facilities

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[3] For the sake of clarity, we want to be clear that the term "component" is meant to be applied broadly and read broadly to include replacements of both large components, such as economizers, reheaters, etc. at a boiler, as well as small items, such as screws, washers, gaskets, etc.

[4] We note that certain ancillary costs incurred during a given replacement activity should not be part of the replacement activity, such as replacement power that must be purchased during the maintenance shutdown of an electric utility.

and for other types of process units. Specifically, for steam electric generating facilities, we have clarified our proposed approach by specifying maximum hourly heat input and fuel consumption rate[5] as basic design parameters. We are also allowing owners or operators of steam electric generating facilities the option to select a pair of parameters based on the process unit's output—more specifically, maximum hourly electric output rate or maximum steam flow rate—as an alternative to the previously proposed input-based parameters. Likewise, we are retaining our proposed approach of specifying maximum rate of fuel or material input for other types of process units, but we also allow you to use maximum rate of heat input, or maximum rate of product output if you prefer an output-based basic design parameter. In addition, we allow you to propose an alternative basic design parameter(s), if the above options are inappropriate for your process unit.

We are not specifically defining the basis for determining the replacement value of a new process unit. Instead, the final rule provides you with the flexibility of using any of the following: (1) Replacement cost;[6] (2) invested cost, adjusted for inflation; (3) the insurance value, where the insurance value covers complete replacement of the process unit (rather than, for example, lost revenue replacement); or (4) another accounting procedure to establish a replacement value of the process unit if such accounting procedure is based on Gen-

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[5] Actually proposed as "fuel consumption specifications."

[6] Replacement cost can be either an estimate of the fixed capital cost of constructing a new process unit or the current appraised value of the process unit.

erally Accepted Accounting Principles (GAAP). The GAAP are the conventions, rules and procedures that define accepted accounting practice for recording and reporting financial information, including broad guidelines as well as detailed procedures. The basic doctrine was set forth by the Accounting Principles Board of the American Institute of Certified Public Accountants, which was superseded in 1973 by the Financial Accounting Standards Board.

If you choose to use options 3 or 4 to determine the replacement value for a particular process unit, you must send a notice reflecting your decision to your reviewing authority. The first time that an owner or operator submits such a notice for a particular process unit, the notice may be submitted at any time, but any subsequent notice for that process unit may be submitted only at the beginning of the process unit's fiscal year. You must continue to use the same basis to evaluate any additional activities that you undertake on that process unit within that same fiscal year. If you have provided notice of using either option 3 or 4, then the reviewing authority will assume that the same method will be used for subsequent fiscal years unless you send a notice to them declaring your intent to use another method. In the absence of providing any notification to your reviewing authority, you must use option 1 or 2.

The final rules also set forth a definition of process unit, specifically delineate the boundary of the process unit for certain specified industries, and define a functionally equivalent replacement. A more detailed discussion of these requirements and our rationale for this

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action is contained in other parts of this preamble section.

Today's final rules are designed to allow you to engage in activities that facilitate the safe, reliable and efficient operation of your source. We believe that today's final action broadens the major NSR program exclusion for equipment replacements and provides you with additional certainty as to what equipment replacement activities qualify for the RMRR exclusion. By adding certainty to the process, we are removing the disincentives to undertaking routine equipment replacements and promoting proper operational planning to facilitate safe, reliable and efficient operations. When an activity qualifies for the ERP, it will be considered RMRR and excluded from major NSR without regard to other considerations. In many cases, we believe that maintaining safe, reliable and efficient operations will have the corresponding environmental benefit of reducing the amount of pollution generated per product produced. The final rules also will reduce the resource burden on reviewing authorities resulting from implementation of the existing, case-by-case process for determining RMRR. In these respects, the final rules are consistent with the central purpose of the CAA, "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." CAA section 101.

B. *What Is an Identical or Functionally Equivalent Replacement and Why Should Such an Activity Be Considered RMRR?*

We proposed to exclude the replacement of existing equipment with identical or functionally equivalent components. As we observed at the time of our RMRR proposal, we believe that most identical and functionally equivalent replacements are necessary for the safe, efficient and reliable operations of virtually all industrial operations; are not of regulatory concern; will improve air quality (e.g., by decreasing startup, shutdown, and malfunctions); and thus should qualify for the ERP under the RMRR exclusion. We believe industrial facilities are constructed with the understanding that certain equipment failures are common and ongoing maintenance programs that include replacing components in order to maintain, restore, or enhance the reliability, safety, and efficiency of a plant are routine. Conversely, delaying or foregoing maintenance could lead to failure of the production unit and may create or add to safety concerns.

When such equipment replacement occurs, the replaced component is inherent to both the design and purpose of the process unit, and there is no reason to believe that such activity will cause the unit to emit above its original design capacity. Moreover, most of these replacements are conducted at industrial facilities to maintain proper operations and to implement good engineering practices. For example, if a pump associated with a distillation column fails and is replaced with an identical new pump, we believe that such a common activity is and should be considered an excluded replace-

ment. It is not a "change" to the plant, since it merely maintains the plant as designed. Instead, it is the type of activity expected to occur to maintain the plant. Therefore, we think replacements like this properly fall within the exclusion for "routine maintenance, repair and replacement." We also believe treating them in this fashion is consistent with the basic policies of the CAA: that existing plants are subject to major NSR permitting requirements only when they engage in an activity that constitutes an opportune time to install state-of-the-art pollution control equipment.

We also believe that this principle extends beyond the replacement of equipment with identical equipment. When equipment is wearing out or breaks down, it often is replaced with equipment that serves the same purpose or function but is different in some respects or improved in some ways in comparison with the equipment that is removed. To continue with the example used above, if, instead of replacing the worn out distillation column pump with an identical one, the owner or operator replaced it with a new and improved model, it does not seem to us that this changes the fundamental reasons for treating that replacement as likewise within the scope of "routine maintenance, repair and replacement."

This is particularly true since technology is constantly changing and evolving. When equipment of this sort needs to be replaced, it often is simply not possible to find the old-style technology. Owners or operators may have no choice but to purchase and install equipment reflecting current design innovations. Even if it is possible to find old-style equipment, it seems unnecessary and undesirable to generally construe NSR permit-

ting requirements in a manner that is bound to deter owners or operators from using the best equipment that suits the given need when replacements must be installed.

The limiting principle here is that the replacement equipment must be identical or functionally equivalent and must not change the basic design parameters of the affected process unit (e.g., for electric utility steam generating units, this might mean heat input and fuel consumption specifications). We also believe, however, that we need not and should not treat efficiency as a basic design parameter as we do not believe NSR was intended to impede industry in making energy and process efficiency improvements. We believe such improvements, on balance, will be beneficial both economically and environmentally. This treatment of efficiency should address the concern and perception that the NSR program serves as a barrier to activities undertaken to facilitate, restore, or improve efficiency, reliability, availability, or safety of a facility.

Today's rule does not distinguish between the replacement of components that are expected to be replaced frequently or periodically and the replacement of components that may occur on a less frequent or one-time basis. It likewise does not distinguish between the replacement of larger and smaller components, instead requiring greater scrutiny if the replacement in question is part of an activity that exceeds 20 percent of the replacement value of the process unit.

Our decisions on these points are derived from reflection on the function of the exclusion in the context of

the CAA. As explained above, and as described more fully in our legal analysis set forth below, we do not believe that application of the major NSR program to "modified" plants is designed to require existing plants that are continuing to operate in a manner consistent with their original design to curtail their rate of production or hours of operation beyond limitations set forth in their existing permits. We likewise do not believe that the program is designed to discourage plants from replacing parts or components so as to preserve their ability to produce at that rate. Rather, we believe Title I of the Clean Air largely leaves to State and local permitting authorities whether to require adjustments in the operations of those plants in order to reduce emissions to the degree needed to attain or maintain national air quality standards, and how to weigh the trade-offs such adjustments may produce in terms of potential economic impacts and loss of productivity. Instead, we believe the central function of the application of major NSR permitting requirements to "modifications" is to assure that plants install state-of-the-art pollution controls.

We recognize that on these points, the approach taken by our final rule thereby differs in some respects from the multi-factor, case-by-case approach we have been using in identifying RMRR, and particularly from some of our applications of that test to certain equipment replacements. We believe, however, that this adjustment in our approach is fully warranted for the reasons outlined above, and described more fully in our legal analysis below.

The following examples of functionally equivalent replacements under today's rule include:[7]

• Replacing worn out pipes in a chemical process plant with pipes that are constructed of different metallurgy (e.g., to help reduce corrosion, erosion, or chemical compatibility problems).

• Replacing an analog controller with a digital controller, even though a similar analog controller can still be purchased and even though the new controller would allow for more precise control. A good example was presented to us by the forest products industry during our review of the NSR program's impacts on the energy sector. A company in that sector needed to replace outdated analog controllers at a series of six batch digesters. In this case, the original controllers were no longer manufactured. The new digital controllers, costing approximately $50,000, are capable of receiving inputs from the digester vessel temperature, pressure, and chemical/steam flow. The new controllers would have more precisely filled and pressurized digesters with chips, chemicals, and steam, thus bringing a batch digester on line faster.

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[7] As discussed in more detail below, although such activities would be functionally equivalent, they would still need to meet other criteria to qualify for the ERP. For example, a functionally equivalent replacement does not qualify for the ERP if it results in a change to a basic design parameter of the affected unit. If an activity does not qualify for RMRR under the ERP, the case-by-case RMRR approach would still be available to the owner or operator under those circumstances. And, of course, even if the activity does not qualify for the RMRR exclusion, the activity will not be a modification and, hence, will not trigger NSR unless it results in a significant emissions increase.

• Replacing an existing mill or pulverizer (e.g., grinding clinker in a cement factory or coal for a boiler) with a new one of a different type because both new and old equipment serve the same purpose (even if the characteristics of the ground material would be different before and after the replacement).

• Replacing existing spray paint nozzles with new ones that might atomize the spray better or have a higher transfer efficiency because the "before" and "after" nozzles serve the same function.

At the same time, there are numerous activities that occur at facilities that may fall within the bounds of the cost threshold percentage, basic design parameters, and other backstop features of today's rule, but nevertheless cannot qualify for the RMRR exclusion on the grounds that the equipment is neither identical nor functionally equivalent. An example of this would be a chemical processing facility where the owner or operator makes a physical change that allows the production of a new end product that physically could not have been manufactured with the previous equipment using the same raw materials as used before in the same amounts as before. This would not be a functionally equivalent replacement activity because the facility is able to produce an end product after making the change that the facility was not capable of making before the change. Consequently, this activity would not qualify as RMRR under today's ERP.

Several commenters said the equipment replacement provision will streamline the major NSR applicability analysis. A number of commenters believed the

ERP would be easier to implement than the proposed annual maintenance, repair and replacement allowance approach. One commenter said that allowing identical replacements to be excluded from major NSR will codify existing industrial practices, where replacement has no impact on emissions and would clearly represent RMRR.

Many commenters expressed support for the ERP, but recommended certain changes that they felt needed to be made to improve the proposal. One commenter supported the ERP in combination with a capacity-based option, on the assumption that repair and maintenance is to be excluded as well as equipment replacement.

One commenter attempted to collect data from turbine customers and found that achieving a level of data collection necessary for the ERP was far from simple, because the cost of maintenance activities is affected by such things as variability in engine model, package technology, and type of maintenance contract. Another commenter gave an example of the benefit that the ERP may provide. Without the ERP, the commenter said the source is limited to some fraction of boiler tubes allowed to be replaced at a given time, whereas with the ERP, replacement of all boiler tubes would, in the commenter's opinion, rightfully be considered routine. Another commenter said the ERP will remove regulatory burdens for types of equipment replacements that are in their view "routine," such as replacement of tubes in industrial boilers. They added that, without a clearer understanding of which activities are RMRR, they may be inclined to delay conducting such replacements.

Many other commenters generally opposed any change to the RMRR exclusion, including one based on equipment replacement. Some of these commenters believed the ERP was problematic because it would allow a source to replace an entire process unit over time. Two of the commenters opposed the ERP because they felt it would create disincentives for the implementation of Plantwide Applicability Limits (PAL) and Clean Unit provisions from the recently finalized rule.

One commenter said that from an engineering standpoint, for a power plant, the difference between routine maintenance and a major plant refurbishing project is clear. To further clarify, the commenter made the following points. According to the commenter, routine maintenance is frequent and follows a predictable pattern. The commenter characterized routine maintenance at power plants as: repair of leaking pipes, pumps, valves, and fans; cleaning and lubrication of components; and inspections. The commenter added that permanent staff do this work either while the plant is operating or during only brief periods of downtime. The commenter further expressed that activities that are not routine require long plant or process unit shutdowns, are done infrequently, and are major capital projects for which special funding is set aside as a result of years of planning and design work.

One commenter said the proposal will allow emissions increases that will be difficult to offset through other regulations. One commenter objected to the ERP for a number of reasons: (1) The provision does not prevent replacement with different equipment; (2) it does not promote efficiency improvements or application of

good air pollution controls; and (3) it would allow replacements that would significantly increase emissions. This commenter said replacement of air pollution controls should trigger best available control technology (BACT) or lowest achievable emission rate (LAER) requirements. Two local air pollution control agencies in California noted that they currently already exclude all replacements with identical equipment from major NSR when certain conditions are met.

Commenters generally had similar viewpoints on allowing both identical and functionally equivalent equipment replacements to qualify as RMRR. However, some commenters expressed greater concern related to excluding the replacement of equipment with functionally equivalent equipment. Primarily their concerns were rooted in the fact that a functionally equivalent replacement component could lead to increases in operational efficiency or productivity, and these commenters asserted that these sorts of process enhancements should not be excluded as RMRR.

We agree with the commenters who felt identical and functionally equivalent replacement activities generally should be excluded as RMRR. We also agree with the commenters who believe that this provision will streamline the major NSR applicability process and will bring clarity. The provision we are finalizing will allow a source to make a simple determination as to whether a replacement piece of equipment qualifies as identical or functionally equivalent. This type of determination will be straightforward and easier for the source to implement than the current case-by-case analysis required to determine a replacement falls within the RMRR ex-

clusion. We support the air pollution agencies that have already excluded these types of changes from NSR.

We disagree with those commenters who believe that this provision will create disincentives for sources to accept a PAL or have emission units designated as Clean Units. A PAL offers a source to bring on entirely new emissions units with no Federal preconstruction permit, as long as emissions caps are not exceeded. A PAL or a Clean Unit designation allows a source to make modifications without performing a major NSR applicability test. These advantages will still be the driving force for sources to elect to use the PAL or Clean Unit provisions, and we do not believe this final rule will significantly detract from their appeal.

We also believe that there is substantial value in facilitating equipment replacements to a greater degree than our current approach permits and draws a cleaner and more easily administered line between equipment replacements that categorically do not require a permit and major plant refurbishing which will result in increased emissions. For pieces of equipment used at industrial facilities, most manufacturers have well-established procedures for the inspection and replacement that are part of the regular maintenance necessary to provide for the equipment's safe, efficient and reliable operation. Some of these replacements are large in terms of cost and infrequent, but all are necessary to maintain the safe, efficient and reliable use of the process unit. We believe it is important to allow for these replacements provided that certain safeguards are in place, as discussed below.

We disagree with suggestions from commenters that the time period between activities, standing alone, provides an appropriate or clear distinction between activities that should be permissible under the RMRR exclusion and those that should not. In fact, some components wear out every year, while others wear out every 20 years. Nevertheless, both types of changes should fall within the ERP of the RMRR exclusion because both allow the facility to operate as designed. By not imposing a time limitation, the ERP allows replacement activities to be driven by consideration of economic efficiency rather than artificial regulatory constraints.

We disagree with commenters who expressed particular concern about functionally equivalent replacements. We continue to believe such activities should be encouraged and should qualify as RMRR. Even though a functionally equivalent component varies in some respects from the replaced component, we feel the most important factor to consider is whether the replacement will serve the same purpose as the replaced component. We acknowledge that a functionally equivalent replacement can result in an increase in efficiency and, consequently, productivity. In fact, one of our goals is to promote such outcomes. However, we believe that the basic design parameter safeguard is appropriate to assure that the ERP only automatically excludes from major NSR functionally equivalent replacements that do not result in a significant change to the fundamental characteristics of the process unit.

We note that the two local programs in California that exclude the replacement of equipment with identical equipment also allow the replacement of equipment

with functionally equivalent equipment without considering such action to be a modification. Due to local air quality considerations, the local programs establish minimum pollution control requirements that are imposed in some circumstances when functionally equivalent equipment replacements occur. Nothing in today's rule would prevent a State or local program from imposing additional requirements necessary to meet Federal, State or local air quality goals.

After reviewing the comments on our proposal, we have decided to promulgate what we proposed in December 2002 for the RMRR equipment replacement provision with relatively minor changes. We decided to include another safeguard in addition to those we proposed in order to appropriately constrain the meaning of the term "functionally equivalent." The additional safeguard is that an excluded replacement activity cannot cause the process unit to exceed any emission limitation or operational limitation (that has the effect of constraining emissions) that applies to the process unit and that is legally enforceable.

Thus, today's final rule allows you to categorize identical and functionally equivalent equipment replacements as RMRR if the fixed capital cost of such replacement plus the cost of repair and maintenance activities that are part of the replacement activity does not exceed 20 percent of the replacement value of the process unit, and if the replacement does not alter a basic design parameter of the process unit or cause the process unit to exceed any emission limitation or operational limitation (that has the effect of constraining emissions) that applies to the process unit.

C. *What Cost Limit Has Been Placed on the Equipment Replacement Approach?*

The next concept presented in the proposal is the cost-based limitation on the scope of the ERP. The purpose of this threshold is to distinguish between those equipment replacement activities that should automatically qualify as RMRR without further consideration and those activities that should undergo case-specific consideration. This concept is akin to the long-established reconstruction provision under the NSPS program. For the reasons explained below, we have decided to establish a 20-percent cost threshold under the ERP.

We believe a similar bright-line rule that would obviate the need for case-by-case review under our multi-factor test of appropriate categories of equipment replacements would be extremely useful in addressing many of the problems that we have identified with the current operation of the NSR program. Such a rule would be particularly useful in avoiding the uncertainty and delay, and consequent postponed or foregone equipment replacements, that our multi-factor case-by-case review induces. For example, our RIA indicates that it takes a year, on average, to obtain a determination whether a proposed replacement is routine. That kind of delay obviously creates perverse disincentives to refrain from equipment replacements and instead repair existing equipment or find some other solution.

This is the kind of problem that classically leads agencies to fashion bright-line tests to provide greater regulatory certainty and efficiency. Moreover, because

the kind of disincentives that give rise to this concern operate largely by economic means, prompting sources to take one course of action (cut back on productive equipment replacement) rather than another (replace the equipment and incur the costs of delay, as well as potentially the costs of installing state-of-the-art controls), we think a cost-based threshold is a reasonable basis on which to create such a bright-line rule.

In the proposal, we observed that it may sometimes be difficult to determine where to draw the line between an activity that should be treated as an excluded replacement activity and one that should be viewed as a physical change that might constitute a major modification, when the replacement of equipment with identical or functionally equivalent equipment involves a large portion of an existing process unit. We solicited comment on a range of equipment replacement cost thresholds such as one based on the NSPS program. Under the NSPS program, when the cost of a project at an existing affected facility exceeds 50 percent of the fixed capital cost that would be required to construct a comparable entirely new unit (that is, the current capital replacement value of the existing affected source), then the source must notify and provide information to the permitting authority. After considering a range of factors, including the cost of the activity, the estimated life of the facility after the replacements, the extent to which the replaced equipment causes or contributes to the emissions from the source, and any economic or technical limitations on compliance with the NSPS, the

reviewing authority determines whether the proposed project is a reconstruction.[8]

We observed that, in some respects, an equipment replacement cost threshold set at the NSPS reconstruction test could be an appropriate approach for distinguishing between routine and nonroutine identical and functionally equivalent replacements under the major NSR program. As under the NSPS program, we do not believe it is reasonable to exclude from major NSR those activities that involve the total replacement of an existing entire process unit.

We also noted, however, that there are other considerations pointing in favor of a threshold lower than the 50-percent reconstruction threshold that might be appropriate to bound the ERP. Under NSPS, when a source undertakes a replacement activity at an existing affected facility that constitutes half or more of the facility's capital replacement value, our rules require a case-by-case determination as to whether such replacements constitute construction. We noted that a percentage threshold lower than 50 percent might be more appropriate for determining where we would require case-by-case consideration of the question whether equipment replacements constitute a modification of an existing process unit under major NSR. We solicited comments on the appropriate level of any percentage.

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[8] In the proposal, it was incorrectly stated that applicability of the NSPS was triggered if a project exceeded 50 percent of the cost of replacing the affected facility. As stated in this notice, if an activity exceeds this cost threshold, that only triggers further evaluation, not the automatic application of the NSPS to the source.

Many commenters supported the threshold of 50 percent of replacement value as the upper limit on equipment replacement. They felt this number is consistent with existing regulatory requirements and would accord the flexibility originally intended under the CAA for RMRR activities, while at the same time assuring that major, nonroutine projects remain subject to major NSR applicability review, and they felt this number is consistent with a common-sense interpretation of the regulations.

They also believed a 50-percent cutoff to be consistent with reconstruction definitions used in many NSPS and National Emission Standards for Hazardous Air Pollutants regulations. Some commenters stated that a 50-percent cutoff for the ERP would be valid for the same reason as for the NSPS reconstruction test; significant changes to a process unit are necessary before retrofit controls should be considered, provided there is no increase in emissions.

Many other commenters opposed the 50-percent replacement value threshold. They believed the capital replacement percentage should be much less than 50 percent. One commenter suggested as an appropriate threshold that the sum of equipment replacement costs for a single process unit over any period of 5 consecutive years should not exceed 50 percent of the replacement value of the process unit. Another commenter said the replacement percentage should not be higher than 25 percent. Another commenter suggested a replacement percentage of 5 to 10 percent to reduce the risk of replacement of an entire process unit over time without installation of BACT. One commenter said a more ap-

propriate perc[illegible]ge for electricity producers is 0.1 to 1.0 percent. A[illegible]ther commenter said the threshold should be 5 percent, 1 percent, or even less, as shown by an NSR enforcement case against the Tennessee Valley Authority (TVA).

Another commenter believed the 50-percent number has no practical effect in protecting public health and the environment, and the commenter was not aware of any projects that have exceeded 50 percent in cost.

While opposed to the ERP in general, one commenter said the cost threshold should be as high a percentage as possible, so as not to promote premature replacement of equipment that is repairable. Another commenter said the 50- percent number from the NSPS is archaic and not environmentally protective. This commenter suggested that the threshold instead be 24 percent. The commenter believed this lower percentage is appropriate because the lifetime of high-cost materials will considerably exceed 5 years.

We agree with those commenters who see a relationship between establishing a threshold for equipment replacements that we will treat as RMRR under the major NSR program and the threshold the NSPS program established for reconstruction. However, we disagree that these two thresholds should be the same. The NSPS threshold was intended to identify those activities that, even though they did not qualify as a modification under NSPS, nevertheless are of such magnitude that further consideration should be given as to whether they are projects tantamount to new construction. The 50-percent NSPS threshold is not a bright line in the sense

that all projects that exceed 50 percent are automatically considered as reconstruction. Rather, as discussed above, it is a threshold intended to alert permitting authorities to significant projects and allow case-by-case decisions based on a series of regulatory factors.

The ERP replicates the NSPS concept in some ways. It identifies a threshold below which there is no need for further inquiry into whether an activity qualifies for the ERP and above which there is a need for a case-by-case determination. The major difference between the ERP and the NSPS reconstruction test is that the ERP deals with modifications, not reconstructions. This difference weighs in favor of establishing the equipment replacement threshold at something less than the reconstruction threshold. It is logical and practical to conclude, as some of the commenters do, that by using the word "modification" the CAA intended to capture activities on a smaller scale than reconstructions. As noted above, we have set the ERP cost threshold at 20 percent. This value is less than one-half of the 50-percent reconstruction threshold and, therefore, fits well within this conceptual framework.

A 20-percent cost threshold would be consistent with the decision of the U.S. Court of Appeals for the Seventh Circuit in the *Wisconsin Electric Power Company* v. *Reilly* ("WEPCO") case, to the extent that it would not automatically allow the activities performed there to constitute RMRR. *See* 893 F.2d 901 (7th Cir. 1990). This court decision directly addressed the question of what level of "like kind" replacement activities qualify as changes under the major NSR program.

In the WEPCO case, the Court considered an activity involving 5 coal-fired units at WEPCO's Port Washington plant. Each unit was rated at 80 megawatts of electrical output capacity. The activity involved the replacement of numerous major components. The information submitted by WEPCO showed that the company intended to replace several components that are essential to the operation of the Port Washington plant. In particular, WEPCO sought to replace the rear steam drums on the boilers at units 2, 3, 4, and 5. According to WEPCO, these steam drums were a type of "header" for the collection and distribution of steam and/or water within the boilers. WEPCO viewed their replacement as necessary to continue operation of the units in a safe condition. In addition, at each of the emissions units, WEPCO planned to repair or replace several other integral components, including replacement of the air heaters at units 1, 2, 3, and 4. WEPCO also planned to renovate major mechanical and electrical auxiliary systems and common plant support facilities. WEPCO intended to perform the work over a 4-year period, utilizing successive 9-month outages at each unit. The cost of the activity was estimated in 1988 to be $87.5 million. The Court noted that EPA concluded at the time this activity was unprecedented in that EPA did not find a single instance of renovation work at any electric utility generating station that approached this activity in nature, scope and extent. The Court determined, at our urging, that the changes did constitute a "physical change" under the NSR rules.

In the case of a steam electric generating facility, the process unit definition provided in today's rule is nearly identical to the make-up of the "comparable new

facility" that was used in the NSPS evaluation of the WEPCO renovation project. However, under our rule we would not include the cost of pollution control equipment in determining the replacement cost of the WEPCO process units. WEPCO had electrostatic precipitators on each of its 5 process units, which our rule would subtract from the replacement cost. In addition, the WEPCO evaluation dealt with 5 boilers, each with its own turbine-generator set; to be consistent with today's definition of steam electric generating facility, we would likely treat each boiler unit as belonging to a different process unit. However, since all of the boilers underwent similar renovations, for simplicity we can assume that all of the process unit-specific activity costs are equivalent.

Using 1991 dollars, consistent with the timeframe of the Seventh Circuit Court's decision, it appears that the value of the 5 process units at the 400-megawatt WEPCO Port Washington facility would be approximately $321 million based on 1991 model plant values provided by the International Energy Agency. The 1988 project cost of $87.5 million scaled up to 1991 dollars would have had an adjusted project cost of $92.3 million.[9] Thus, the capital cost percentage for the replacement activities at WEPCO, averaged over its 5 process units, amounted to 29 percent. Alternatively, using the project cost of "at least $70.5 million" cited in the 1991

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[9] Using the Chemical Engineering magazine's Annual Plant Cost Index (composite), $87.5 million in 1988 dollars is equal in real terms to (361.3/342.5) multiplied by 87.5 million, or $92.3 million in 1991 dollars.

decision by the Seventh Circuit, and using the same value for process unit cost, we compute at least 22 percent. The 20-percent threshold is, therefore, beneath the scope of the activities at issue in the WEPCO case and hence not inconsistent with that decision.

The 20-percent threshold also is supported by available data for the electric utility sector. We have a robust and detailed set of information available on maintenance, repair and replacement activities for the electric utility sector. Information about the electric utility sector persuades us that we have established the right ERP threshold for this sector.

Information on other industrial sectors beyond electric utilities (as well as general economic theory) further supports our 20 percent bright line test. Case studies performed by an EPA contractor and included in Appendix C of our final regulatory impacts analysis (RIA) estimate the overall impact of the rule on six different industrial sectors (pulp and paper mills, automobile manufacturing, natural gas transmission, carbon black manufacturing, pharmaceutical manufacturing, and petroleum refining). The case studies find that routine equipment replacement activities generally do not cause emissions increases. The case studies also find that equipment replacement activities vary widely within these industries. Likewise, the cost of these activities as a percent of the process unit replacement value varies widely. We recognize that the study addresses specific case examples from only a part of regulated industry and that the project cost information is derived from a limited inquiry of industry representatives. We believe, however, that the study provides a

useful scoping assessment that tends to support the proposition that the 20 percent threshold derived for the utility industry (which is based on robust industry data) should be applied to industry as a whole. In short, the study supports our view that it is reasonable to assume that equipment replacement activities in the utility industry are similar enough to replacement practices in other industry that the 20 percent value determined for utilities, is appropriate for industry as a whole. This data indicates that most typical replacement activities will fall within the 20-percent threshold. At the same time, the data indicates that some major replacement activities likely will cross the 20-percent threshold and will require a case-by-case evaluation under the multi-factor RMRR test.

Two comment letters (from the Utility Air Regulatory Group (UARG) and from the American Lung Association (ALA), *et al.*) were particularly helpful in understanding the issues associated with the electric utility sector. The UARG provided as an attachment to its comment letter a document describing major repair and replacement activities that its members believe must be undertaken at utility generating stations in order to keep those facilities operational. The UARG noted that capital costs incurred for repair and replacement activities at an individual process unit additionally include activities more minor than those addressed in the document. The UARG grouped repair and replacement activities into project families; within each project family were per-component costs ($/kW) for numerous equipment replacement activities. We have reviewed the list of projects supplied by UARG and have concluded that these types of replacement activities are important to

maintaining, facilitating, restoring or improving the safety, reliability, availability, or efficiency of process units. Therefore, generally speaking, these types of individual activities and groups of activities should qualify for the ERP and be excluded from major NSR without case-specific review. We also believe that it is reasonably expected in the electric utility industry for groups of these activities to be implemented at the same time. Such groupings should also be excluded without case-specific review. When we compare the 20-percent ERP cost percentage to the UARG data, we find that individual replacement activities would, in fact, qualify for the ERP and that limited groupings of these activities would qualify. However, larger groupings of these activities—groupings that are not usually seen in the industry—would not qualify for the ERP. This shows that the 20-percent threshold will be effective in distinguishing between activities (and aggregations of activities) that should not require case-specific review to be excluded from major NSR and those that do.

The ALA commenters provided with their comments the results of their analysis of projects at issue in an NSR enforcement case against Tennessee Valley Authority (TVA). As shown in the ALA comment letter, the Clean Air Task Force and the Natural Resources Defense Council looked at costs for 14 projects on a process unit basis, in year 2001 dollars, from the publicly available record for the case. For all but one of the challenged projects, the ALA commenters calculated a cost of less than 4 percent of process unit replacement cost. The ALA commenters submitted results of this analysis with their opposition to a source-wide, 5-percent maintenance allowance. As noted above, we concluded in our

2002 report to the President that the NSR program—and the RMRR provision in particular— has in fact resulted in delay or cancellation of activities that would have maintained and improved the reliability, efficiency, and safety of existing energy capacity. The primary purpose of today's rule is to rectify this problem. Thus, to the extent the activities addressed by ALA qualify for the ERP, we now believe that such activities, if conducted in the future, should be excluded from major NSR.

A final factor that we believe supports our selection of a 20 percent threshold is the cost of installing state-of-the-art controls on existing units. There is obviously no single answer to the question of at what point that cost becomes the deciding factor in an owner's decision whether to replace a piece of equipment and incur that cost, since much will depend on the rate of return on the investment. Nevertheless, we think it is reasonable to assume that if the cost of the controls is greater than the cost of the replaced equipment, it is likely to operate as a substantial deterrent to replacing the equipment at issue. That is likely to be the case with respect to electric utilities if we set the threshold below 20 percent, which represents the approximate cost of retrofitting existing plants with state-of-the-art controls. The equation is similar for industrial boilers. Notably, those sectors represent a substantial fraction of the emissions potentially subject to the NSR program. While the relative costs of air pollution controls in other industries vary more widely than the costs for utility and industrial boilers, we nevertheless believe that the costs and technical issues associated with retrofitting air pollution con-

trols factor significantly into equipment replacement decisions.

D. *What Will Be the Basis of Applying the 20-Percent Threshold?*

In the proposal, we solicited comment on whether implementing the ERP on a per-activity basis or on some other reasoned basis, such as applying the percentage to components that are replaced collectively over a fixed period of time, may be more workable.

Many commenters stated that the ERP should be implemented on a per-activity (or aggregation of activities) basis. Two of the commenters cited longstanding NSR precedent as the basis of their comments, while two other commenters relied on NSPS precedent. Another commenter thought the per-activity approach would be less confusing than summing activities over a fixed period of time. Other commenters believed the equipment replacement threshold should in fact be applied on a 5-year rolling average.

We have decided to apply the percentage threshold on a per-activity (or aggregation of activities) basis. This is consistent with how major NSR has been applied in the past and will continue to apply in the future, with the exception of those sources which establish a PAL. The major NSR program is a preconstruction program that requires applicability to be determined for a given activity at a facility and, as necessary, permitting to occur prior to the time activities are commenced. The major NSR program also requires applicability to be determined, in the first instance, based on an assessment only of the parts of a facility involved in the activity. A per-

activity basis works well with this approach. We are not going final with a "component-by-component" approach that we solicited comment on through our RMRR proposal.

There would be obvious problems if we chose any of the other approaches suggested in the proposal or suggested by commenters (for example, annual basis or 5-year rolling average). One of the primary concerns with applying the percentage to activities performed over a span of time is that we would be restructuring the major NSR program to operate based on after-the-fact determinations. This raises the difficult question of what happens under this type of approach if you learn after commencement of an activity that it does not qualify under the ERP. This situation is largely avoided by the per-activity approach that we are establishing in today's rule.

It should be noted that activities that are related must be aggregated under the ERP, in the same way as they would have to be aggregated for other NSR applicability purposes. Under our current policy of aggregation, two or more replacement activities that occur at the same time are not automatically considered a single activity solely because they happen at the same time. For example, a steam turbine rotor replacement project and a boiler tube replacement project would not be aggregated simply because they occur during the same maintenance outage and on the same process unit. Further inquiry into the nature of the activities and their relationship to each other is needed before deciding whether the activities must be aggregated under NSR. Also, non-replacement activities that are part of a larger re-

placement activity should be included when calculating costs for a replacement activity against the capital cost threshold.

E. *What Basic Design Parameters Are Being Established To Qualify for the Equipment Replacement Provision?*

In the proposal, equipment replacements were only eligible for the ERP if they did not change the basic design parameters of the process unit. We proposed that maximum heat input and fuel consumption specifications for EUSGUs and maximum material/fuel input specifications for other types of process units are basic design parameters. We solicited comments on limiting the eligibility of the ERP this way and on the basic design parameters we proposed.

Several commenters expressed concerns with either the use of these specific parameters, or the restriction of the regulated community to only this set of design parameters. Other comments centered around an inconsistency in how EPA has accounted for efficiency in the basic design parameter safeguard. The commenters stated that, while EPA stated in the proposed preamble that efficiency is not a basic design parameter, the basic design parameter safeguard, as proposed, has the potential to bar equipment replacements that achieve significant gains in efficiency.

Commenters from all sides supported EPA's approach to handling activities intended to improve an affected process unit's performance beyond its basic design parameters. Commenters asserted that these actions would not fall within the RMRR exclusion.

Commenters from the gas transmission industry concurred and amplified this concept, stating that an engine that is "uprated" at the time of overhaul should not be excluded from major NSR under the RMRR exclusion.

We recognize that the proposed basic design parameters are inconsistent with some industry conventions, and that we should allow for industry-specific flexibility or specify additional source category-specific parameters. For example, for natural gas transmission compressor stations, commenters explained that brake horsepower is the conventional design capacity parameter. We received similar comments from other industries, including cement and surface coaters, who objected to limiting their facilities to the proposed basic design parameters. Accordingly, we have decided to provide flexibility by providing a menu of choices from which the owners or operators may select and also by allowing for owners or operators to propose alternative basic design parameters to their reviewing authority which would then be made legally enforceable.

In addition to this flexibility, there may be a need for additional flexibility in using the basic design parameters that are spelled out in today's rule. For instance with boilers, maximum steam production rate is often used by the industry, and it may make sense in some cases to set the design parameters based on those values rather than on maximum heat input. Likewise, a crude oil distillation tower may have several capacities that are a function of the type of crude that is to be processed, and so a refiner may need to have a set of basic design parameters for its crude towers. These situations can be addressed by the source proposing alterna-

tive parameters or sets of parameters to their reviewing authority.

Also, there should be flexibility in how the basic design parameters are demonstrated when the owner or operator chooses not to rely on the design information for its process unit. For example, in order to establish the heat input value that the process unit has demonstrated it is capable of achieving, an electric generating unit should have the flexibility to reference available credible information, such as results of historic maximum capability tests or engineering calculations. Results from tests performed by electric utilities in the context of providing assurances to generation dispatch systems and regional or national power pools may be used to establish the process unit's maximum heat input. A review of such data or other available operational data or design information can reveal the heat input that the process unit is capable of achieving in its "pre-activity" configuration, and this can be compared to a "post-activity" heat input value. Plant operators, where the specified basic design parameters are inappropriate for the process, can propose what the measure of performance will be for these process units, including the use of permit limits on amount of production, to their reviewing authority. For process units having multiple end products and raw materials, the owner or operator should consider the primary product or primary raw material when selecting a basic design parameter.

Many pieces of equipment are purchased based on their capacity or output. Consequently, for both utilities and non-utilities, we have modified the proposed basic design parameters to include output-based alternatives

in today's final rule. For utilities, the owner or operator can select maximum hourly electric output rate and maximum steam flow rate as its basic design parameters, as an alternative to using input-based measures of maximum hourly fuel consumption rate and maximum hourly heat input. (We are clarifying from the proposal that the correct parameter is maximum hourly heat input, not maximum heat input.) Owners or operators may set different design parameters for different fuel types (such as coal or oil) or a combustion device that can accommodate multiple fuel types: for coal-fired units, owners or operators should consider that the fuel consumption rate will vary depending on the quality of the coal for a given heat input. When establishing fuel consumption specifications in terms of weight or volume, the minimum fuel quality based on BTU content should be used for coal-fired units.

Regardless of whether the source selects a basic design parameter(s) specified for non-utilities in today's rule or gets approval from their reviewing authority to use an alternative parameter(s) for any type of source, we have not specified a fixed averaging time period for the circumstance because we want the owner or operator to have the flexibility to select an averaging time that best accommodates their operation. In most cases, we believe that long term averaging periods (*e.g.*, a 12-month fixed period) will not be appropriate.

Thus, an equipment replacement that improves a process unit's efficiency and thereby enables the unit to return to its design parameters can qualify as RMRR even if current actual emissions increase as a result. For example, if boiler tubes or refractories are replaced

on a boiler process unit, and these activities are beneath the capital cost threshold and are within the unit's basic design parameters, then they would qualify as RMRR under the ERP even if this improves the unit's efficiency.

The manufacturer's design parameters of a process unit are always acceptable if an owner or operator chooses to rely on them. In the rare cases where a facility does not have established design parameters, we believe that a reasonable look back period should be used for establishing the pre-activity values for basic design parameters, rather than taking the condition of the process unit immediately before the activity. We have therefore established a 5-year look back period, consistent with that for the NSPS hourly emissions increase test, for these situations.

We were urged by some commenters to incorporate a *de minimis* increase level in the basic design parameters that would allow activities to qualify for the ERP even though the activities would result in a minor change to the relevant basic design parameters. They argued that some effects resulting from the replacement may not be apparent before the equipment has been replaced. They argued that allowing for small changes in basic design parameters would add greater certainty to the ERP because unforeseen small changes would not cause an activity to lose the exclusion after the fact. While we sympathize with the commenter's concern, we do not see a ready solution to this problem under the RMRR exclusion. In fact, we are not persuaded that those types of changes can be readily justified under the ERP because it is hard to see how an activity that

causes basic design parameters to change is not "a change" under NSR.

In sum, we continue to believe that an identical or functionally equivalent replacement should not qualify for the ERP if the activity causes the process unit to exceed its specified basic design parameters. Without such a requirement, significant alteration of a process unit's fundamental design could be accomplished under the guise of the ERP. Such an outcome obviously does not square with the idea that identical or functionally equivalent replacements are not "changes" under the major NSR program. Our final rule is different from the proposal, however, in that it provides greater flexibility in defining basic design parameters for process units. We were persuaded by commenters who expressed concerns that the proposed approaches did not adequately encompass all affected operations and industry sectors.

F. *What Collection of Equipment Should Be Considered in Applying the Equipment Replacement Provision and How Should It Be Defined?*

In the proposal, we raised the issue of what collection of equipment should be considered in applying the threshold under the ERP. We proposed the term "process unit" as the appropriate collection to accommodate the intended coverage of activities under the ERP. The purpose of this term is, to the extent possible, to align implementation of the ERP with generally accepted and practical understandings of what constitutes a discrete production process. The general definition that we proposed was based closely on the definition of process unit contained in 40 CFR 63.41 and read as follows:

Process unit means any collection of structures and/or equipment that processes, assembles, applies, blends, or otherwise uses material inputs to produce or store a completed product. A single facility may contain more than one process unit.

To help illustrate these concepts, we further proposed five industry-specific examples of how this definition of process unit might be applied.

Some commenters compared the proposal's definition of "process unit" (" * * * producing or storing a completed product * * * ") to the definition that is used by section 112(g) and that appears in 40 CFR 63.41 (" * * * producing or storing an intermediate or final product * * * "). One of the commenters supported the proposed definition. Two commenters said the rule's

definition should be consistent with that used by section 112(g), which they believe is broad enough to encompass interrelated operations. While supporting the RMRR proposal's definition, two commenters recommended that EPA provide regulatory flexibility by allowing a facility the option to choose which definition it will use.

One commenter generally supported the proposed definition of "process unit," but this commenter believed that "the delineation of a process unit should be made by regulated entity rather than explicitly defined in a rule."

Three commenters asserted that pollution control equipment should be included in the process unit definition. One industry commenter said pollution control equipment is often integral to the process and may produce an intermediate product. One environmental commenter believed the proposed rule was unclear as to whether pollution control equipment is part of the process unit.

Several commenters said the proposed definition is too vague or broad. Another commenter urged EPA to change the definition of process unit to limit the scope of what is allowed in the ERP, so that the source of emissions (for example, an entire coal boiler) would not be allowed to be replaced without major NSR. The commenter asserted that the replacement unit's scope should be limited to an emission unit.

Most commenters agreed that the general process unit definition is sufficient. However, a number of commenters suggested that we revise or eliminate some of the process unit examples (that is, the industry category-specific definitions), and others were con-

cerned that the proposed definitions do not support the detailed process unit definition for a specific industry because the definitions will never capture all possible elements and configurations.

We received comments from several industry representatives suggesting changes to our proposed industry-specific definitions, and also to request that we delineate other process unit types explicitly in the rule. Definitions were submitted for sugar mills, chemical manufacturing plants, surface coating operations, flat glass manufacturing, fiberglass manufacturing, and gas compressor stations.

One industry commenter agreed with our proposed approach to proportionately allocate, based on capacity, the cost of those components shared by two or more process units. Another commenter suggested that, for electric utilities, we allocate the cost of shared equipment based on a pro rata share of megawatts produced.

We agree with the commenters who favor using a process unit as the basis for administering the ERP and including a definition of process unit in the final rule. We also agree with the commenters who suggested that the definition of process unit should be consistent with the definition in 40 CFR 63.41, and we have altered the final rule definition to include those processes that produce "intermediates." We acknowledge that, without further explanation, the term "intermediates" is susceptible to misinterpretation, which can cause confusion and lead to less regulatory certainty. Thus, we provide the following explanation as to how we intend to interpret today's rule.

By "intermediates," we mean the intended product of an integrated facility operation. For example, for an automotive manufacturing plant, while the completed product would be the driveable vehicle ready for shipping to the showroom, an intermediate product could be the engine or the painted body shell. In this case, we would not consider smaller production operations, such as the e-coat, primer surface, or top coat operation, to be intermediates in the context of our final rule definition for process unit. Our primary goal in defining this term "process unit" is to encompass integrated manufacturing operations that produce a completed product, and those operations that produce an intermediate as the product of the process unit. In the case of the automotive paint shop, series of coating steps together comprise the carefully designed and interrelated set of operations, all of which are needed to provide a coating system that meets design specifications. The individual operations almost never are implemented individually and, as a practical matter, simply would serve no meaningful purpose in the absence of the others.

We disagree with the commenters who wish to include all pollution control equipment in the definition of process unit. We feel that periodic replacement of components of emissions control equipment should be encouraged and would rarely lead to actual emissions increases. In instances where identical or functionally equivalent replacement of pollution control equipment occurs, it is likely you will qualify for a Pollution Control Project exclusion. We do agree, however, that where the control equipment is an integral component of the process it should be included. Therefore, we are exclud-

ing associated pollution control equipment from the definition of the "process unit," except for control equipment that serves a dual purpose in the process. We know there are industries where pollution control equipment performs a dual purpose; for example, condensers often serve to control emissions of organic air pollutants while serving as an integral component of the operation of a fractionation column. A low-NO_x burner is another example of a dual-purpose component. In such cases, to provide clarity and simplify administration of the ERP, our rule provides that dual purpose equipment should be considered part of the process. We are also clarifying in today's rule that administrative buildings (including warehousing) are not to be included in the process unit, but other types of non-emitting units that are integral to the processing equipment should be included.

We also have included in our final rule industry-specific examples of how this definition might be applied. The examples are drawn from three selected industrial processing categories—electric utilities, refineries, and incinerators. We proposed each of these detailed definitions and received mostly support from commenters on their accuracy. While we also proposed detailed definitions for two other industries—pulp and paper and cement producers—we have decided not to finalize those definitions after receiving comments from the relevant industry trade association asserting that the definitions did not, and could not, capture all of their industry's configurations and they believed the generic process unit definition was sufficient for their industry. Because of the centrality of the "process unit" concept to the usefulness of the ERP, it is our desire to include specific definitions for steam electric generating facili-

ties, petroleum refineries, and incinerators in the final rule to provide as much certainty as possible for facilities in these industries. As noted above, these definitions also should be useful for those in other industries who will apply our general definition because the industry specific definitions provide clear examples of how we intend the general definition to be interpreted and applied. During the public comment period on the proposal, several commenters submitted additional industry specific definitions and asked us to put them in the final rule. We are not finalizing these suggested definitions at this time, because we did not include them in the proposed rule. However, provided below are the process unit definitions that commenters submitted to us and that we think comport well with the general definition of process unit promulgated today.

• For a natural gas compressor station, each compressor system, together with its proportionate share of common support equipment is a separate process unit. This would generally consist of the air inlet system, accessory drive system, gas producer, fuel delivery system, cooling system, lube system, power turbine, power shaft, control system, starting system, exhaust system, and support facilities (e.g., auxiliary power generating equipment, heating/cooling equipment, station and yard pipe, valves, etc.).

• For a flat glass manufacturing plant, each production line within a facility should be a separate process unit. Flat glass production is completed on a continuous line where raw materials are added at one end, a continuous ribbon of glass is formed, and finished glass is packaged at the other end. The flat glass production line consists of: the batch house, where raw ma-

terials are stored and weighed; the furnace and refiner, where the raw materials are melted; the bath, where the glass ribbon is formed; the lehr, where the ribbon is annealed; and the cutting and packaging equipment, where the glass is removed from the line for sale to customers or for additional processing later.

• For a fiberglass production facility, each production line is a separate process unit. Fiberglass is manufactured on a continuous line where raw materials are melted at one end to form a continuous strand of fiberglass that is packaged at the other end. The fiberglass production line begins with the batch house, where raw materials are stored and weighed. In the melter, forehearth, and refiner, the raw materials are melted and refined. From the refiner, glass fibers are formed through controlled bushings. From the bushings, the continuous strand fibers are either directly cut or packaged or wound onto spools for packaging for sale to customers or for additional later processing.

• For the production of precipitated amorphous silica, the process unit includes, but is not limited to: raw material storage and handling equipment used for mixing sand and other raw materials prior to addition to the furnace; the furnace itself; the raw material storage and handling equipment for the cullet dissolving and silica precipitation process; all dissolving, precipitation, and filtration tanks and equipment; and drying equipment. Further, the process unit includes all the product packaging, storage, handling, and transfer equipment.

• For a chemical manufacturing plant, the process unit would include all the equipment assembled and connected by pipes or ducts to process raw materials and to

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manufacture an intended primary product and associated byproducts or intermediates. The process unit can consist of more than one unit operation. Chemical manufacturing process units may include, but are not limited to: raw material storage, and air oxidation reactors and their associated product separators and recovery devices; reactors and their associated product separators and recovery devices; distillation units and their associated distillate receivers and recovery devices; associated unit operations; associated recovery devices; and any feed, intermediate and product storage vessels, product transfer racks, and connected ducts and piping. A chemical manufacturing process unit includes pumps, compressors, agitators, pressure relief devices, sampling connection systems, open-ended valves or lines, valves, connectors, instrumentation systems, and process control or dual purpose air pollution control devices or systems. For a chemical manufacturing facility, there are several types of process units: those that separate and distill raw material feedstocks; those that change molecular structures through reactions or polymerization; those that "finish" the reacted or polymerized product, through compounding, blending, or similar operations; auxiliary facilities, such as boilers and by-product fuel production; and those that load, unload, blend, or store products. Process equipment that acts to control emissions, such as condensers, recovery devices, and oxidizers, is considered part of the process unit.

We note that we were unable to include some other process unit definitions submitted by commenters. While we do not believe that these other proposed definitions were necessarily inconsistent with our general definition of process unit, we had concerns and questions

with some of these proposed definitions. We believe that now that this rule is issued, we can more fully evaluate those other definitions, including communicating with the leading industry officials, and determine whether we would approve of their use.

Finally, we have made some slight corrections to the process unit definitions that we proposed based on comments we received on the proposed definitions.

There are numerous industries that have industrial boilers at their facility to provide electricity and steam to their operations. As a general rule, we would expect these boilers to be treated as a separate process unit from the other unit operations occurring at the facility. We would expect the boundaries of the process units for such boilers to be consistent with the boundaries established under the definition for a steam electric generating facility in today's rule, which encompasses all equipment from coal handling to the emission stacks.

We also decided to continue to require that owners or operators who have components shared by two or more process units to proportionately allocate, based on capacity, the cost of those components. And we agree with the commenter that an equitable approach for electric utilities having components shared by two or more process units is to allocate the cost of shared equipment based on the pro rata share of megawatts produced by each process unit.

G. *Consideration of Non-Emitting Units as Part of the Process Unit*

Many commenters supported excluding non-emitting equipment from the ERP. One commenter stated that triggering the major NSR review process for maintenance activities is an impediment to continuous improvement projects for certain products and processes, even if actual emissions decrease or only non-emitting units on the process line are affected. Delays or postponements of project maintenance work adversely affect the reliability, safety and productivity of operations and cost control efforts. Another commenter recommended that work at clearly non-emitting units, specifically including foundation regrouting and repair and frametop replacement, should be excluded from this rule. Three commenters believed that non-emitting units cannot result in an increase of emissions and thus do not need to be evaluated under major NSR.

A blanket exclusion for non-emitting units could create problems of interpretation because the term "non-emitting components" is ambiguous when considering certain components. Commenters asserted that identifying and separating out non-emitting components can be a complex undertaking, and may be contrary to the goal of a clear and straightforward option. One commenter provided the following examples: (1) Piping systems (although pipe connectors are a source of fugitive emissions, the pipe normally is not); and (2) structural supports for a process unit (separating out the cost of supports from an investment basis throughout a facility will be difficult).

Another commenter believed it would be difficult to separate the costs of emitting and non-emitting equipment when determining the cost of the process unit. The commenter also believed it would be difficult to determine allocation of shared equipment in the cost analysis.

We are concerned that, if owners or operators were allowed to strip away all of the non-emitting components from a process unit definition, it would create significant ambiguity in the rule and could result in significant variation in how the rule is applied to similar sources in different jurisdictions. In addition, we simply do not think it is practical or logical to separate "non-emitting" components of a process unit from "emitting" components. We believe that integrated manufacturing operations (that is, process units) typically include both types of equipment. Separating emitting from non-emitting equipment would create an artificial divide that contrasts sharply with physical and operational reality.

As noted above, however, we do believe that a distinction should be made between non-emitting equipment that is part of a process unit and non-emitting equipment that is functionally distinct from the process unit. For example, most production facilities have buildings or space to house administrative offices, such as offices for the plant accounting staff. Such non-emitting facilities should not be considered part of any process unit under today's rule.

H. *What Is the Accounting Basis for the Process Unit?*

In the proposal, the accounting basis for the ERP discussed was the same as for the NSPS reconstruction provision, which is the fixed capital cost that would be required to construct an entirely new unit. We also discussed for the annual maintenance, repair and replacement allowance using the invested cost of a unit as the accounting basis. We proposed that it would be appropriate to require that costs be calculated using an approach along the lines set out in the EPA Air Pollution Control Cost Manual (*http://www.epa.gov/ttn/catc/dir1/c_allchs.pdf*). Finally, we solicited comment on whether the costs associated with the unanticipated shutdown of equipment, due to component failure or catastrophic failures such as explosions or fires, should be included in evaluating costs under the ERP.

In reviewing comments, we recognized that some commenters appeared to direct their comments on the accounting methods at the annual maintenance, repair and replacement allowance, and not necessarily the ERP. Often, we came to this conclusion simply by the way the commenters organized their comments, and not by any specific statements in the comment letter. However, since we asked for comment on the accounting approaches as they would be applied to both the annual maintenance, repair and replacement allowance and the ERP, we believe that comments that appeared to be dedicated to the annual maintenance, repair and replacement allowance should also apply to our evaluation of the accounting for the ERP, except in the case where the commenter specified that their comments on the

proposed accounting methods applied only to the annual maintenance, repair and replacement allowance or the ERP. Likewise, for considering whether costs associated with unanticipated shutdown of equipment, we considered the comments to apply to both the ERP and the annual maintenance, repair and replacement allowance unless the commenter specifically noted that the comment should not be applied to both of the proposed rule provisions.

Most commenters asked for flexibility on whether a facility should use replacement value, invested cost or insurance valuation as the basis for the calculations. They felt that all were of equal merit and different ones would be available at different facilities so EPA should not prescribe only one type.

Most commenters did not support the sole use of the EPA Air Pollution Control Cost Manual (APCCM) to standardize calculations for replacement and repair costs for RMRR in general. Most commenters felt that the APCCM is a worthy reference for costing but also that sources should not be limited to only one manual, because a single manual is likely to have shortcomings and not be able to represent every situation.

Many commenters supported an exclusion of costs for unanticipated shutdowns and failures. They noted that strong incentives exist to avoid fires, explosions and other unanticipated equipment failures because of the risk of human injury and production interruptions and because of the expense involved in restoring lost capacity. As a result, they contend that a catastrophic event already penalizes the facility dramatically, but then to

impose the case-by-case analysis would only exacerbate their troubles. They explained that failures take place occasionally and can result in a sudden, unplanned partial or total loss of equipment. When such a failure occurs at a natural gas compressor station, the turbine or engine concerned must be replaced immediately to avoid a disruption in gas supply. Other facilities may have similar pressures to maintain their product around the clock. Such replacement fits easily within most elements of the equipment replacement test. Commenters asserted that replacing a catastrophically failed turbine or engine is clearly "routine," since companies will always replace such failures.

Other commenters, however, opposed an exclusion for unanticipated shutdowns and failures on the grounds that maintenance activities performed during forced outages are simply maintenance and should be considered as such, particularly given that the proposed RMRR rule approaches and the December 2002 final rules already have given the industry a number of exclusion options.

We are allowing sources to determine the applicability of today's rule on the basis of replacement value, with an option for sources to notify their reviewing authority in writing if they desire to use another option (for example, invested cost or insurance value where the insurance value covers only the complete replacement of the process unit). The equipment replacement cost should be based on the current replacement value of the entire process unit at the time of conducting the activity.

Typically, replacement value is more easily obtained than invested cost. Most manufacturers will have information concerning the replacement value of a process unit, because such costs are commonly used when evaluating various business scenarios relating to manufacturing costs. Also, use of replacement value is consistent with the NSPS provisions.

In addition to determining the replacement value of a process unit, in our final rule we allow for the use of several other accepted methods in different industries for estimating such values. Replacement values are the estimated value of replacing a unit and can be based on a current appraisal. In lieu of replacement cost, you can also use inflation-adjusted original investment, insurance limits if insured for full replacement of the unit, or other cost estimation techniques currently employed by the company, as long as the company follows GAAP and if approved by the reviewing authority.

A dollar-per-kilowatt rate for calculating costs may be appropriate for utilities. This model is specific to source and fuel type and is updated periodically. We allow sources to use insurance valuation methods such as the Handy-Whitman Index to determine replacement costs for electric utilities. Other sources to compute costs include the Nelson Refinery Construction Index Factors, Solomon Refinery Study, and licensors of the respective process unit (*e.g.*, Kellogg, UOP).

In order for a cost-based approach to be equitable, all owners or operators must include the same categories of expenses in both the process unit replacement value and the replacement activities sought to be ex-

cluded. Therefore, although the final rule does not mandate any particular approach, we believe it is generally appropriate to calculate costs using an approach similar to the elements of Total Capital Investment as defined in the APCCM. While the manual contains basic concepts that could be used to estimate total capital investment at a process unit, it is geared toward cost calculations for add-on control equipment. On the other hand, the underlying concepts are taken from work done by the American Association of Cost Engineers to define the components of cost calculations for all types of processes, not just emission control equipment. In certain cases, other manuals might make more sense depending on their circumstances.

Under the APCCM, total capital investment includes the costs required to purchase equipment, the costs of labor and materials for installing the equipment (direct installation costs), costs for site preparation and buildings, and certain other indirect installation costs. However, any costs that are part of the installation and maintenance of pollution control equipment should be excluded from the cost calculation, per our discussion in the previous section of this preamble. We believe equipment that serves a dual purpose of process equipment and control equipment (combustion equipment used to produce steam and to control hazardous air pollutant emissions, exhaust conditioning in the semiconductor industry, etc. should be considered process equipment.

Direct installation costs include costs for foundations and supports, erecting and handling the equipment, electrical work, piping, insulation, and painting. Indirect installation costs include such costs as: engi-

neering costs; construction and field expenses (costs for construction supervisory personnel, office personnel, rental of temporary offices, etc.); contractor fees (for construction and engineering firms involved in the activity); startup and performance test costs; and contingencies.

We believe there may be merit to the comments we received advocating a categorical exclusion for unanticipated shutdowns and failures of some kind. When such an outage occurs, there may be a real urgency to restore the plant to operation without forcing it to await the results of a permitting action or applicability determination. In the past, we have handled these situations with case-by-case consent orders; however, even that approach may lead to unnecessary delays. It may specifically be sensible to relaxing the 20 percent cost threshold limitation for such events because it is unlikely that sources would incur an outage to avoid controls. We did not propose such a stand-alone exclusion and hence we believe we should not act upon it at this time.

I. *Enforcement*

1. Compliance Assurance

We believe that the records developed and maintained in the ordinary course of business will provide the primary means of assuring compliance with today's rule. We know that, as a general rule, companies necessarily generate and keep records related to the types of projects covered by today's rule. For example, companies generally have comprehensive procedures by which funds are allocated to both capital and maintenance expense projects. Many of the records generated by these

procedures are needed for tax accounting purposes and, by law, must be maintained for at least 6 years. Moreover, additional records must be maintained in industries regulated for other purposes, such as the energy sector (over 90 percent of which, by capacity, is subject to FERC regulation). Public utilities, licensees and natural gas companies that are subject to FERC jurisdiction must, unless they receive a waiver from the Commission, comply with extensive accounting and record retention requirements. They must keep financial information according to uniform systems of accounts that are set out in 18 CFR part 101 for public utilities and licensees, and 18 CFR part 201 for natural gas companies. These uniform systems of accounts include hundreds of specific accounts, including individual accounts for boiler plant equipment, engines and engine-driven generators, turbogenerator units, and hundreds of other asset, liability, cost and property items.

These companies also must retain records according to the schedules set forth in 18 CFR part 125 (for public utilities and licensees) and 18 CFR part 225 (for natural gas companies). The types of records that companies must keep include, for public utilities and licensees, for example, generation and output logs (records must be kept for 3 years), load records (3 years), gauge-reading reports (2 years), maintenance work orders and job orders showing entries for labor, materials and other charges in connection with maintenance and other work pertaining to utility operations (5 years), work order sheets for construction work in progress (5 years), appraisals and valuations made of utility property or investments (3 years), engineering records, drawings, and other supporting data for proposed or as-constructed

utility facilities, including detail drawings and records of engineering studies (must be kept until facilities are retired), contracts or other agreements relating to services performed in connection with construction of utility plant (6 years after the plant is retired or sold), general and subsidiary ledgers (10 years), paid and canceled vouchers, and original bills and invoices for materials, services, etc. (5 years).

Altogether, these various sources of information provide more than reasonable assurance of compliance with today's rule. This is particularly true given EPA's broad authority to inspect affected facilities and require submission of compliance related data. Accordingly, we are not imposing any recordkeeping requirements in today's rule.

2. General Issues

Today's rule provides revisions to the major NSR program to specify categories of equipment replacement activities that we will consider RMRR in the future. As recognized by the U.S. Supreme Court, an agency may not promulgate retroactive rules absent express congressional authority. *See Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988). The CAA contains no such expressed grant of authority, and we do not intend by our actions today to create retroactive applicability for today's rule. 42 U.S.C. 7401 *et seq.* Today's rule applies only to conduct that occurs after the rule's effective date.

None of today's rule revisions apply to any changes that are the subject of existing enforcement actions that the Agency has brought and none constitute a defense

thereto. Furthermore, prior applicability determinations on major modifications that result in control requirements in an NSR permit that currently applies to a source remain valid and enforceable as to that source.

As noted above, today we are changing the scope of the RMRR exclusion from the major NSR program by taking final action on the ERP. If you subsequently undertake an activity that does not meet the applicable provisions of these new alternatives and do not obtain a preconstruction permit if you are required to do so, you will be subject to any applicable enforcement provisions (including the possibility of citizens' suits) under the applicable sections of the CAA. Sanctions for violations of these provisions may include monetary penalties of up to $27,500 per day of violation, as well as the possibility of injunctive relief, which may include the requirement to install air pollution controls.

J. *Quantitative Analysis*

At proposal, we presented a quantitative analysis of the possible emissions consequences of the range of different approaches to the RMRR exclusion to evaluate if our policy conclusions are correct. Our analysis was conducted using the Integrated Planning Model (IPM). This analysis was done for electric utilities because we have a powerful model to perform such an analysis that we do not have for other industries. We stated that the results for electric utilities accurately reflect the trends we would see in other industries.

The IPM analyses of different scenarios showed that the breadth of the RMRR exclusion would have no practical impact on, let alone be the controlling factor in

determining, the emissions reductions that will be achieved in the future under the major NSR program. The analyses showed that emissions of SO_2 are essentially the same under all scenarios, but that under today's rule these emission levels will be met in a more economically efficient manner than the base case. This stands to reason because nationwide emissions of SO_2 from the power sector are capped by the title IV Acid Rain Program. For NO_X, these analyses showed modest relative decreases in some cases and modest relative increases in other cases. These predicted changes represent only a fraction of nationwide NO_X emissions from the power sector, which hover around 4.3 million tons per year (tpy). At this time, we do not have adequate information to predict with confidence which modeled scenario is most likely to occur. What these analyses indicate, however, is that regardless of which scenario is closest to what comes to pass, today's rule will not have a significant impact, up or down, on emissions from the power sector. However, we expect the rule to result in significant improvements in safety, reliability, and other relevant operational parameters.

The DOE also presented further analysis of the possible emissions consequences of the range of different approaches to the RMRR exclusion. Using the National Energy Modeling System (NEMS), a variety of changes in energy efficiency and availability were evaluated, as well as the effect on emissions resulting from these regulatory revisions. This analysis concluded that efficiency improvements resulting from increased maintenance, repair and replacement are expected to decrease emissions, whereas availability improvements are expected to increase emissions. In the cases repre-

sented in this analysis, the emissions reductions from assumed reductions in heat rates tended to dominate the corresponding effects of the assumed availability increases.

A number of commenters said that the underlying assumptions EPA used in the IPM analysis were flawed and resulted in erroneous conclusions regarding the emission reduction potential of the proposed RMRR rules. Several commenters stated that EPA's IPM analysis incorrectly assumes that no major modifications at any older units would ever trigger the requirement to add new pollution controls. In addition, according to commenters, EPA also erroneously assumed that this lack of major maintenance, repair and replacement will have very little impact on the performance of those power plants, when in reality their emissions would increase significantly. The commenters cited a Clean Air Task Force analysis for power plants, which estimates that EPA's rule revisions will result in at least 7 million more tons of SO_2 and 2.4 million more tons of NO_x annually. Some commenters also questioned the appropriateness of using EPA's analysis for the electric generating sector to draw conclusions about non-utilities.

One commenter said the IPM and DOE NEMS analyses correctly demonstrate that EPA's RMRR proposal will have no appreciable impact on emissions from the power sector. According to the commenter, this conclusion is consistent with EPA's findings in a 1989 report, "1989 EPA Base Case Forecasts," which demonstrated that continuing to allow utilities to undertake activities including ongoing annual operating and maintenance activities and a major refurbishment when the

unit reached 30 years of operating life would have no appreciable impact on emissions from the power sector, just as EPA's and DOE's recent analysis confirmed.

One commenter said the proposal lacks any reference to the gains accomplished by major NSR, the ongoing enforcement actions, settlements reached as a result of those actions, or the potential gains from the investigations now pending. The commenter argued that EPA's reliance on improvements in productive capacity as the measure of success fails to consider that productive capacity must be balanced with the interests of health and welfare. The commenter also noted that a critical part of EPA's burden is to consider all the relevant factors leading to its conclusion that the exclusions are necessary and appropriate and that at the very least this includes an assessment of the expected effects on emissions, which in turn will determine the public health benefits and costs of the proposed rule. Although data on emission reductions achieved under the existing program are available, we have stated that we cannot precisely quantify the effects the proposed rule will have on emissions. Some commenters stated that before promulgating a final rule, EPA should provide such a quantitative assessment of the rule.

We disagree with the commenters who believe that emissions would be significantly higher for electric utilities than are estimated under the IPM model runs. These commenters' arguments rely on the assumption that EPA's base case is invalid because, if major NSR rules were left unchanged, eventually all coal-fired utilities would either apply BACT or deteriorate so badly that they would have to shut down. We do not believe

this assumption is accurate. As we have explained, our experience suggests that under the current NSR program, managers of coal-fired electric generating facilities have available to them a number of actions they can take to avoid triggering major NSR, and in many instances they will take one of these actions to avoid the high retrofit costs and delays in obtaining a major NSR permit. If necessary, owners or operators can and will limit their activities to those that do not trigger major NSR, and will take enforceable restrictions on fuel use or other actions to avoid major NSR. This results in some decline in efficiency and capacity, as the EPA's base case modeled, but the units would likely remain viable electric generating units for years without triggering BACT requirements. Thus, we believe our base case represents a far more realistic assessment of what would happen under current major NSR rules than the dramatic BACT reductions presented by these commenters.

Furthermore, while some of the facilities may be modified and subjected to control, nationwide emissions as estimated in the model runs would still rise to the level of the Acid Rain cap for SO_2. To the degree these modifications come at facilities that are otherwise projected to be controlled because of existing SO_2 and NO_x requirements, there would be no difference in effect between the model runs and alternative scenarios. We agree with the commenter who noted that the recent analysis and the estimated impact on emissions is consistent with the previous EPA report in 1989. Our recent analysis confirms that efficiency improvements have the potential to result in environmental benefits that offset (or more than offset) emissions increases from improved

availability, but that previous major NSR rules discouraged these improvements.

Regarding the applicability of our analysis to non-utility sectors, we continue to believe that our conclusions are valid for all sectors, and further, that the effects from the electric utility industry dominate those from other sectors. We acknowledge that the results for the SO_2 cap for utilities cannot be extended to non-utilities that are not similarly capped. However, our model runs for NO_x reflected the absence of a cap, and are therefore valid for other uncapped sectors. Thus in the case of industrial boilers, which behave similarly to utilities, we would expect to see similar efficiency improvements and availability improvements occurring in tandem, resulting in either modest increases or decreases. Because the overall emissions from this sector are significantly smaller than for utilities, the modeled effects for utilities are expected to dominate the analysis.

For other industrial sectors, we do not anticipate that emissions increases will result from equipment replacement activities that qualify as RMRR under today's rule. While some efficiency improvements may result, the overall effect of these improvements will not be to induce greater demand and greater emissions, in contrast to the effect shown by the modeling for utilities (*i.e.*, demand for other industrial sectors depends on independent factors). Indeed, without increased demand, efficiency improvements that lower emissions per unit of output would result in a decrease in emissions.

A number of commenters raised concerns that EPA had not analyzed the impact of the final rule on indus-

tries other than for electric utilities. We have, thus, supported further efforts to analyze empirically the effects of this rule. This work is included in the Regulatory Impact Analysis (RIA) for the final rule. Even the experts involved in this analysis emphasize that empirical assessments of the costs, emissions, and other economic and environmental effects of this rule are extremely difficult to perform, particularly when generalizing beyond the specific industrial sector and type of facility involved. The analysis would have to simulate a great many decisions made by each plant involving routine maintenance under a variety of policy scenarios. There is simply no credible way to make these assessments for the entire economy or for an entire sector. Hence, with the exception of the electric utility industry model, we relied on a case study approach to gain insights as to how this rule affects particular industrial sectors.

A series of case studies were analyzed by an EPA contractor to estimate the overall impact of the final rule on six different industrial sectors (automobile manufacturing, carbon black manufacturing, natural gas transmission, paper and pulp mills, petroleum refining and pharmaceutical manufacturing). The analysis was designed to examine effects of the final rule, but it is important to note that the case studies were performed prior to decisions on the exact form and content of the final rule. For example, the selection of process units for each of the industries may not be an accurate depiction concerning how a particular industry's operations should be separated into process units under the final rule. As such, none of these characterizations should be taken as EPA's position on appropriate process units for a given industry. (Information on that subject can be

found in Section III.F of the preamble and in the final rule for selected industries.) In addition, in costing out replacement activities in the different industries, the contractor made assumptions regarding which costs needed to be included and how multiple replacement activities should be grouped that may not be consistent with the final rule. Again, these assumptions on the part of the contractor should not be interpreted as EPA's conclusions of how their rules should be applied to such replacement activities in these industries.

Even with these caveats, the case studies provide useful insight into the potential effects of the final ERP. The six industries are significant sources of air pollution emissions and are very diverse in terms of their types of operations, their existing maintenance, repair and replacement strategies, and the range of potential replacement costs at some of their process units. This diversity is important because the final rule will impact a great many industrial sectors and individual process units which are extremely varied in terms of their maintenance, repair and replacement strategies. For example, issues related to safety, reliability and availability will vary greatly across these industries. The need to assure that the electricity and natural gas supply is reliable and available is critical to ensuring the safety of the public in the hottest and coldest times of the year, and it is critical to the operation of the nation's infrastructure, to the degree they do not have backup power generation, devoted to public health (e.g., drinking water, sewage treatment, food refrigeration, hospitals). Thus, strategies related to maintenance, repair and replacement at existing facilities are critical to ensure that vital electric utilities and natural gas transmission continue uninter-

rupted. As we are clarifying what activities fall within the ERP, owners or operators at these facilities will be able to make decisions on when and how to conduct RMRR activities based on engineering judgement.

The case studies conclude that equipment replacement activities vary widely within these industries for the process units selected. Across the industries, the studies estimated that equipment replacement activities could range in percentage by over an order of magnitude. By establishing a threshold at 20 percent of the replacement cost of the process unit, we believe we have set a reasonable standard that allows most replacements to proceed unimpeded as long as the other safeguards are met. At the same time, under the 20 percent threshold, the most capital-intensive replacements would be subject to case-by-case review. The data from these case studies clearly indicate that 20 percent would function well as the dividing line between those replacement activities that automatically qualify under the ERP and those activities which should be subject to case-by-case review.

The case studies also indicate that replacement activities in these industries should not lead to increased emissions at the sources. Based on the case studies, we believe that replacement with identical or functionally equivalent equipment as the rule requires, will result in equivalent or reduced emissions. The decrease in emissions would result from efficiency improvements that reduce the amount of air pollution emitted per product produced in the process unit. Therefore, if operating levels do not change, then total emissions will decrease

with such identical or functionally equivalent equipment replacements.

The case studies looked at a wide range of projects. We have concluded based on this analysis that replacement activities do not generally cause changes in operating levels at the process unit. Instead, other factors, like economic downturns or increased demand for the product of the process unit, will cause operating levels to fluctuate. Efficiency changes, even when they lead to increases in product output from the same raw material input will not lead to increases in emissions unless an independent factor like increased demand for the product also occurs. We strongly support efficiency improvements where they can occur as long as the other safeguards in the rule are met.

Our inability to model economy-wide impacts does not mean we cannot characterize the effects of this rule. In qualitative terms, the case studies further support our conclusion that the old case-by-case approach to RMRR is having perverse effects by discouraging projects that would improve efficiency. As noted elsewhere, efficiency improvements necessarily imply less pollution holding everything else constant. For example, the case study on the pulp and paper industry finds that:

> [A]s [safety, reliability and efficiency] activities begin to be reviewed, those that raise * * * questions under the ambiguity of the current rules may be postponed, altered, or simply cancelled. Under the proposed ERP approach, these activities can be tested against a clearer set of criteria, that will allow more activities to be executed.

> * * * The new approach provides the regulatory clarity and certainty in making applicability decisions that is completely absent from the current case-by-case approach. Thus, the manner in which mills will handle the processing of equipment replacement activities, with regard to assessing their air permit applicability assessments, will be able to be streamlined. By definition, a "case-by-case" approach is simply unworkable for a typical pulp and paper mill, which may have thousands of maintenance and repair related work orders involving equipment replacements executed each year, affecting all areas of mill operations. Clearly, only a small subset of these equipment replacement activities can be evaluated using the complicated and vaguely interpreted multi-factor test inherent with the current case-by-case approach. * * * The proposed ERP approach helps by setting criteria for the routineness determinations. Under the proposed approach, a mill could set up more straightforward guidelines to be followed throughout an organization that would allow quick and defensible determinations to be made regarding individual maintenance activities.

Based on the analytical work performed by the contractor for pulp and paper, we expect that, at such facilities, the power boiler would be the most affected by the ERP, as well as an important or even dominant emissions source. We would anticipate that this would be true for many of the inorganic and organic chemical subsectors. In fact, we did not pursue an analysis of the chlor-alkali sector, in large part because the power

boiler was the most obvious process unit to analyze, and the issues raised overlapped with the pulp and paper analysis. Thus, it is logical that the conclusions from the case studies would generalize to many other sectors.

Beyond the case studies, there is also a great deal of research and experience that allows for some robust findings. Previous research, such as the articles cited below, supports the following findings:

• *Enhanced efficiency and less pollution in the short run. Holding everything else constant, when a plant's efficiency increases, pollution must go down.* This nation's growing experience with pollution prevention, efficiency enhancements, voluntary environmental programs, and Environmental Management Systems adoption all reinforce the notion that enhanced plant efficiency translates into less environmental pollution.[10] Further, there is an economic incentive to keep plant efficiency high. Proper maintenance and the resulting efficiency enhancements and pollution prevention reduce resource needs and therefore reduce costs.[11] By providing the certainty needed to plan and undertake efficiency investments (economically efficient maintenance) this rule will achieve lower pollution.

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[10] By efficiency, we mean unit of input per unit of output, for example, amount of energy needed to produce a specific amount of output. Another example would be the amount of raw material to produce a specific amount of output.

[11] A common example illustrates the point well. When one "tunes-up" a car, the automobile gets more miles per gallon, is cleaner burning, and is cheaper to operate.

• *The rule will allow firms to take advantage of pollution prevention opportunities and new, innovative pollution-reducing technologies.* As technology advances, plants will be able to replace existing components with functionally equivalent components that enhance energy efficiency (and reduce pollution).[12] One example of such an opportunity identified by the EPA contractor in one of the case studies is the replacement of spray guns on a topcoat operation in order to improve the quality of the paint job, while also increasing the transfer efficiency, and decreasing coating and associated solvent usage. This project could be deemed a physical change and have major NSR applicability ramifications if not for the ERP of the RMRR exclusion. Under the current case-by-case approach to RMRR, the facility may forego the change to the newer spray gun design if there is a perceived risk that the determination could be questioned. Under the new ERP approach, the change would proceed more definitively as RMRR, and thus the emission reductions could be realized.

• *While firms can operate existing plants efficiently, the rule preserves powerful incentives within the CAA to adopt "leap-frog" technologies and production processes that further reduce costs, increase efficiencies and reduce pollution.* Because of the CAA requirements and economic gains associated with improved efficiency, producers still have an incentive to

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[12] For example, energy efficiency is not a design parameter to determine functional equivalency for defining routine maintenance. Accordingly, a firm could adopt a more efficient "functionally equivalent" technology without fear of triggering NSR provisions.

invest in these clean technologies to replace older facilities.

In addition, a substantial body of research has explored the consequences of environmental regulation that sets more stringent control requirements for new sources. This research explores how differentiated regulation can affect firm behavior both on theoretical and empirical grounds. A listing of some of this literature is included in the RIA for the final rule. This literature provides further evidence that the NSR can easily distort investment and production decisions against more efficient maintenance and replacement.

Therefore, based on the information evaluated, we affirm the overall conclusion of our analysis—that today's rule has no practical effect on the environmental benefits of major NSR in the future. We have presented additional, more detailed supporting information in our final RIA and our response to comments document, both of which can be found in the docket for today's action.

K. Consideration of Other Options

In addition to the cost-based approaches that we proposed, we also asked for comment on age-based and capacity-based approaches, and any other viable option for addressing RMRR.

1. Annual Maintenance, Repair and Replacement Allowance

We are not taking action on the proposed Annual Maintenance, Repair and Replacement Allowance option for the RMRR exclusion, and therefore public comments

on this option are not addressed at this time. We will address comments on our proposed Annual Maintenance, Repair and Replacement Allowance if and when we take final action on that proposal.

2. Capacity-Based Option

As mentioned above, we considered the alternative option of developing an RMRR provision based on the capacity of a process unit. Under such an approach, an owner or operator could undertake any activity that does not increase the capacity of the process unit. Basing RMRR on capacity has appeal for several reasons. For starters, an objective of RMRR is to keep a unit operating at capacity and/or availability. In addition, the linkage between capacity and environmental impact is more apparent than that between cost and environmental impact. Finally, this type of approach might, in principle, be easier to use before beginning actual construction than some of the cost-based approaches.

Several commenters were concerned with defining the capacity of a process unit. Capacity may be defined based on input or output. Nameplate capacity of a process unit may vary greatly from the capacity at which the process unit may be able to operate. It may be more appropriate in some industries to measure capacity based on input while in others on output. Commenters felt that a capacity-based approach would not be workable at complex manufacturing sources, because "capacity" as a useful shorthand term for the processing capability correlates exactly only with a historical feed or product slate no longer available or made. A number of commenters supported a capacity-based option, gener-

ally indicating that a capacity-based option would be simpler and less burdensome to use than the other proposed approaches.

Another large concern of commenters was that a capacity-based approach could prevent facilities from performing activities that make the facilities more efficient. RMRR provisions need to include some form of the other approaches to account for energy efficiency projects at utilities, which could increase output capacity (i.e., production) without necessarily increasing heat input or fuel consumption. Some commenters noted that maximum hourly emissions is a more appropriate surrogate for a change in capacity, because it is consistent with existing NSPS procedures and with averaging periods for ambient air quality monitoring and standards.

We agree that an appropriate capacity-based approach would have to be tailored to various types of sources, with capacity based on input for some and on output for others. As an example, in a review of promulgated and proposed Maximum Achievable Control Technology standards, six of eleven standards measured capacity based on process unit output while five standards based capacity on input. In fact, the NSPS exclusion for increases in production rate at 40 CFR 60.14(e) originally was dependent upon the "operating design capacity" of an affected facility. In proposed revisions to the NSPS program published on October 15, 1974, we state (39 FR 36948):

"The exemption of increases in production rate is no longer dependent upon the "operating design capacity." This term is not easily defined, and for certain in-

dustries the "design capacity" bears little relationship to the actual operating capacity of the facility."

We also agree that a capacity-based approach has its limitations, as described by the commenters. We have concluded that the ERP eliminates the need to implement the capacity based approach. We have decided not to finalize a capacity-based approach.

3. Age-Based Option

Under our proposed age-based approach, any process unit under a specified age could undergo any activity that does not increase the capacity of a process unit on a maximum hourly basis without triggering the requirements of the major NSR program. However, the activities could not constitute reconstruction of the process unit; that is, their cost could not exceed 50 percent of the cost of a replacement process unit. The age of the process unit would likely be in the range of 25-50 years. We also proposed that the owner or operator would have to become a Clean Unit as defined at 40 CFR 51.165(c)(3), 51.166(t)(3), and 52.21(x)(3), once the age of a process unit exceeds the age threshold.

Such an approach would provide an owner or operator a clear understanding of RMRR for an extended period of time. It also may provide the owner or operator greater flexibility than under the current system for a limited period of time. Like the capacity-based approach, this approach would, in principle, allow for a fairly simple preconstruction determination of applicability.

Very few commenters expressed any interest in developing this type of approach. Their concerns centered around defining capacity and establishing the age cut-off (because the useful life of equipment is difficult to establish and may vary greatly). Other concerns raised by commenters were that some of the activities that would be allowed at newer sources do not fit within any ordinary meaning of RMRR and some of the activities that would be forbidden at older facilities would come within that meaning, and also that some sources may consciously, and appropriately, engage in aggressive RMRR as a method of maximizing the life span of its process units, and an age-based approach would discriminate against them.

One commenter stated that EPA should establish a normal lifetime, tailored to each industry, beyond which industry would need to install BACT or shut down. This type of approach would obviously require a substantial amount of time and analytical effort.

The age of a source alone is not a legitimate reason to require the addition of pollution control equipment. Age has no direct bearing on a unit's environmental impact; some facilities maintain equipment better than others. We have decided not to promulgate an age-based approach. We have several basic concerns with this approach that we have not been able to reconcile. We also believe that the equipment replacement approach largely addresses the commenters' concerns regarding the age-based approach.

Thus, we have decided not to finalize a rule using this approach.

L. Specific List of Excluded Activities

Several commenters supported the development of lists of activities that are considered RMRR; some of these commenters also supported developing lists of activities that do not qualify as RMRR. Commenters suggested various ways in which such lists could fit into the overall RMRR program. We are concerned, however, that such a list would have to be implemented through rulemaking, which would require a considerable amount of time, analytical effort, and resources.

A commenter suggested two ways by which we could develop a list of qualifying activities. First, we could review records for ongoing enforcement activity, to identify activities that we have and have not already alleged to be RMRR. There is an ample body of knowledge for electric power plants. Second, we could identify where activities would fall with respect to the cost criteria, then adjust the classification of each activity based on the WEPCO criteria to prepare lists of routine and nonroutine activities.

Some commenters felt that industry-specific lists of routine and nonroutine activities would provide the best interim clarification to major NSR until legislative reform is in place. Other commenters opposed the development of lists of activities that are considered RMRR, contending that such lists would become quickly outdated.

Some commenters requested that certain activities be specifically classified as RMRR. These suggested activities included the following:

• The common practice of changing out the engine core in a combustion turbine when it is due for overhaul (to reduce downtime). The removed engine core is overhauled offline, and is then available to be switched in for the next like-kind engine core that reaches the point of overhaul. Unless the components are upgraded, the heat input remains the same and so does the emissions rate.

• Any change that does not increase the achievable hourly emissions (as determined based on the permit and/or original design parameters) of existing equipment, processes, and emissions units.

• Certain activities, for example, boiler tuning and maintenance, repair and replacement of air pollution equipment or CEMS should be categorically excluded as RMRR.

• Any activity that is part of a long-term service agreement (primarily gas turbines) should be categorically excluded from major NSR.

• Any activity involving steam turbine overhaul work should be categorically excluded from major NSR.

Activities such as the above might be RMRR, but we believe there are simply too many activities in too many industries to effectively improve major NSR implementation through creation of lists. Moreover, lists would be a "snapshot in time" that would need to be reviewed and periodically updated for each industry sector. We have consequently decided not to attempt to list activities that are categorically excluded as RMRR.

M. Stand-Alone Exclusion for Energy Efficiency Projects

In the proposal, we acknowledged that certain types of activities that improve energy efficiency would not qualify as RMRR. We solicited comment on whether there was the need for a "stand-alone" exclusion for activities that promote energy efficiency.

Many commenters supported a stand-alone exclusion from major NSR for energy efficiency projects. With the following safeguards, they favored specifically excluding from the definition of "major modification" activities that promote energy efficiency and/or resource conservation when: (1) The activity results in lower emissions per unit of production or lower energy utilization per unit of production; (2) the percent decrease in emissions or energy utilization per unit of production is greater than the percent increase in maximum hourly emission rates; (3) activity costs do not exceed 50 percent of the replacement value of the process unit; and (4) the activity does not result in an increase in allowable emissions.

Other commenters pointed out that efficiency upgrades will frequently create incentives to further utilize a source and subsequently increase mass emissions. One commenter stated that if activities that result in small efficiency gains can qualify as RMRR, older, dirtier electric generating units will be better able to outcompete newer, much cleaner plants (that have higher costs due to emission controls).

One commenter stated that EPA is incorrect in stating that energy efficiency projects are being discouraged by major NSR, particularly under the new actual-

to-projected-actual applicability test. This commenter added that the only projects that are discouraged by major NSR are ones that increase emissions. This commenter felt that the December 2002 final major NSR rules provide a broad range of major NSR exclusions (including revised baseline determinations, Clean Unit designations, pollution control projects, PALS, and combinations of these provisions, as well as an RMRR exclusion) under which energy efficiency projects will certainly occur.

We strongly support efforts to improve energy efficiency at existing power plants. These activities reduce the amount of air pollution emitted per unit of electricity generated. We believe that today's ERP supports energy efficiency projects and that the actual-to-projected-actual applicability test contained in the December 2002 NSR final rules also should remove impediments to energy efficiency projects. Together, these rules will obviate the need for a specified RMRR provision for energy efficiency projects. Thus, at this time we are not finalizing a provision to categorically exclude energy efficiency projects from major NSR.

N. Legal Basis

1. How Does the NSR Program Address Existing Sources and Why Is Today's Rule Consistent With This Approach?

The core of the NSR program is to require preconstruction permits for all new major sources. Congress specifically decided that existing sources generally would not be required to obtain permits. These considerations are the starting point for understanding its ap-

plication to "modifications" and the meaning we should give that term.

The NSR program's scope is closely related to the scope of the NSPS program, created seven years earlier in the CAA Amendments of 1970. In section 111 of the CAA, which sets forth the NSPS provisions, Congress applied the New Source Performance Standards to "new sources," secs. 111(b)(1)(B), 111(b)(4). Congress determined that as a general matter it would not impose the NSPS standards on existing sources, instead leaving to the State and local permitting authorities the decision of the extent to which to regulate those sources through "State Implementation Plans" designed to implement National Ambient Air Quality Standards (NAAQS). *See* sec. 110.

Congress followed a similar approach in determining the scope of the major NSR program established by the 1977 Amendments to the CAA. As amended, the CAA specifies that State Implementation Plans must contain provisions that require sources to obtain major NSR permits prior to the point of "construction" of a source. Secs. 172(c)(5); 165 (a). By contrast, the CAA generally leaves to State and local permitting authorities in the first instance the question of the extent, means and timetable for obtaining reductions from existing sources needed to comply with National Ambient Air Quality Standards. *See* secs. 172(c)(1), 161.

NSR's applicability to existing sources to which a "modification" is made is an exception to this basic concept. This exception likewise finds its roots in the NSPS program's applicability to "modifications" of existing sources. The 1970 CAA made the NSPS program appli-

cable to modifications through its definition of a "new source," which it defined as "any stationary source, the construction or modification of which is commenced after the publication of regulations * * * prescribing a[n applicable] standard of performance * * * ." Section 111(a)(2). Section 111(a)(4), in turn, defined a "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted from such source or which results in the emission of any air pollutant not previously emitted."

Congress did not further define the terms "physical change" or "change in the method of operation" in the NSPS program. Therefore we issued regulations to clarify their meaning. As early as our 1971 NSPS regulations, we have made clear that many activities that do not affect the contemplated operation of a unit in a manner consistent with its original design are not physical or operational changes. Specifically, in our 1971 NSPS regulations, we determined that physical or operational changes do not include:

> (1) "Routine maintenance, repair and replacement" of equipment;
>
> (2) "An increase in the production rate, if such increase does not exceed the operating design capacity of the affected facility";
>
> (3) "An increase in the hours of operation"; and
>
> (4) "Use of an alternative fuel or raw material if * * * the affected facility is designed to accommodate such alternative use."

36 FR at 24877 (Dec. 23, 1971). The premise behind characterizing these activities as not being "changes" is that they all contemplate that the plant will continue to be operated in a manner consistent with its original design.

The 1977 Amendments to the CAA likewise made the NSR program applicable to "modifications." The original 1977 Amendments did so explicitly only in their provisions dealing with the non-attainment portion of the NSR program, *see* CAA sec. 171(4). But in "technical and conforming" amendments to the 1977 Amendments, Congress clarified that it intended the same result with respect to the prevention of significant deterioration provisions, *see* CAA sec. 169(2)(C).

Notably, Congress did not enact a new definition of "modification" in either the original 1977 Amendments or the "technical and conforming amendments." Rather, it incorporated the NSPS definition of "modification" by cross-reference. *See* CAA sec. 169(2)(C); CAA sec. 171(4). In moving the adoption of those amendments, the sponsor (who was also the sponsor of the original 1977 Clean Air Act Amendments and who indicated that the technical amendments had been approved by all members of the original 1977 Amendments conference committee) stated in a summary and statement of intent that he placed in the Congressional Record that this was a deliberate choice. As that summary explained, Congress intended the amendment "implement[ed] the [1977 Clean Air Act Amendments] conference agreement to cover "modification" as well as "construction" by defining "construction" in part C to conform to usage in other parts of the Act." 123 Cong. Rec. 36331 (Nov. 1, 1977). We have understood this to be a reference to our preex-

isting rules interpreting the term "modification" in the NSPS context. 49 FR 43211, 43213 (1984); see also 43 FR 26388, 26394, 26397 (June 19, 1978).

The original 1978 NSR rules concerning modifications that we promulgated after enactment of the 1977 Amendments generally tracked the NSPS approach by specifying that "routine maintenance, repair and replacement" was not a change; by specifying that changes in hours of operation and rates of production were not a "change'; and by using the same basic approach NSPS used to the question of what constitutes an "increase" (increase to a source's potential to emit, except that the NSR rule used annual potential to emit while the NSPS program used short-term potential to emit). 43 FR 26388 (June 19, 1978). Even after the D.C. Circuit struck down other portions of our 1978 NSR rules in its original per curiam decision in *Alabama Power Co.* v. *Costle*, 606 F.2d 1068 (D.C. Cir. 1979), we continued to propose to retain the RMRR provision and the "potential to emit" approach to emissions increases in our revised rules, although to drop the "hours of operation and rate of production" provisions because the "potential to emit" provision made them unnecessary. 44 FR 51924, 51937 (September 5, 1979). In our final 1980 NSR rules, however, issued after the D.C. Circuit's final *Alabama Power* decision, 635 F.2d 323 (1980), we changed our approach to the definition of "increase" in the NSR context to specify that a change would trigger NSR if it would result in an increase over "actual annual emissions." 45 FR 52676 (August 7, 1980). At the same time, and notably, we restored the provisions stating that increases in hours of operation or production rate were not "changes." *Id.* at 52704.

It is important to understand what we did—and did not—decide in those final 1980 NSR rules. What we did decide was that as a general proposition, we would better serve the purposes of the NSR program if we used "actual" rather than "potential" emissions as a baseline for determining whether an activity at a new source results in an emissions increase. What we did not decide was that the purposes of the NSR program never allow us to exclude from the definition of "change" any activity at a plant that may increase its actual emissions but does not increase its "potential" emissions. In particular, for example, we decided to retain the "hours of operation" and "rate of production" exclusions even though such changes might result in increases in "actual" emissions because not having the provisions "would severely and unduly hamper the ability of any company to take advantage of favorable market conditions." *Id.* Similarly, we retained the exclusion for "routine maintenance, repair and replacement" even though it too can result in emission increases. Yet there is little doubt that increases in hours of operation and rates of production and RMRR arguably could be understood to fall within the statutory definition of modification, since increases in hours of operation and rates of production certainly may be argued to be changes in the "method of operation" of a plant, and RMRR certainly may be argued to be a "physical change" to a plant. On balance, however, we rejected that interpretation and determined that the definition of modification should not be read so broadly as to encompass hours of operation or production rate increases, at least so long as they are unrelated to a physical change.

In the revisions to the NSR program we announced last December, we reiterated our adherence to the view that as a general matter we should continue to use "actual" rather than "potential" emissions in determining what activities constitute "modifications" under NSR. We continue to believe that is correct, but we also believe we should amplify our reasons for holding this view and why that view is entirely consistent with the rule we are promulgating today. In determining the scope to give to "modification," we believe it is important to give weight to both aspects of what Congress decided in 1977. Congress decided that generally speaking, existing plants would not be subject to NSR, but that they would be subject to NSR when they made "modifications." It is also important to understand why Congress chose this point at which to impose NSR on existing plants: to avoid the need to impose costly retrofits, but require placement of new control technology at a time when it makes the most sense for it to be installed. *See* H.R. Rep. No. 294, 95th Cong., 1st Sess. 185, *reprinted in* 1977 U.S. Code Cong. & Admin. News at 1254; 116 Cong. Rec. 32,918 (Sept. 21, 1970) (remarks of Sen. Cooper). *See also WEPCO*, 893 F.2d at 909-910; *National-Southwire Aluminum Co.* v. *EPA*, 838 F.2d 835, 843 (6th Cir., Boggs, J., dissenting), *cert. denied*, 488 U.S. 955 (1988). A wholesale exclusion of any activity that restores a plant to its potential to emit from the definition of modification is not consistent with this balance, since there are many activities that might have that effect but the conduct of which would be an extremely effective time for the placement for new control technology.

At the same time, we believe it is also important to give equal weight to the converse proposition that existing plants should not have to install new control technology in the ordinary course of their operations. To require them to do so would fail to give full effect to Congress's decision that existing sources generally would not be required to obtain permits. It would also subject these plants and the consumers who rely on them to enormous dislocation and expense. That is why we believe we have rightly excluded increases in hours of operation and rates of production from the definition of "change." That is also why we believe we have rightly excluded "routine maintenance, repair and replacement" of existing plants from that definition.

For similar reasons, we believe today's rule draws an appropriate line of demarcation between replacements that should not be treated as changes, and those as to which further consideration of the question is appropriate. Our rule states categorically that the replacement of components with identical or functionally equivalent components that do not exceed 20% of the replacement value of the process unit and does not change its basic design parameters is not a change and is within the RMRR exclusion. On the other hand, the rule contemplates case-by-case evaluation of identical or functionally equivalent equipment replacements that do not have these characteristics.

We believe this approach is consistent with the intended scope of "modification" under the NSR program. The record of this rulemaking demonstrates that there are substantial categories of replacement activities undertaken in order to assure the safety, reliability and

efficiency of existing plants that, if conducted at the same time, cost less than the 20- percent replacement cost threshold. It also demonstrates that there are sound business reasons why an owner or operator may find it makes sense to conduct some of these activities at the same time.

On the other hand, given the costs and technical problems associated with installing state-of-the-art pollution controls at existing facilities, we do not believe it plausible that, if faced with the choice of replacing equipment that has a value less than 20 percent of a process unit and having to install those controls, or coming up with another solution—such as repairing the existing equipment or limiting hours of operation so as to be confident that the activity will not trigger NSR—the owner of a source would elect to replace the equipment if he also has to install the state-of-the-art controls. Rather, we believe he will repair the existing equipment or artificially constrain production. Therefore the replacement of that equipment is not, in fact, an opportune time for the installation of such controls. It follows that treating such replacements as an NSR trigger will not lead to the installation of controls. Rather, it will merely create incentives to make a plant less productive than its design capacity would allow it to be.

We do not believe it is the policy of the CAA to seek to promote emissions reductions by forcing new limits on hours of operation or rates of production of existing plants. We made that point clear in 1980 when we determined that we should retain the hours of operation and rate of production exclusions in the NSR context. To the contrary, as we said in promulgating the 1980 rules, Con-

gress's decision to exclude existing sources because of the dislocation that covering them would cause can reasonably be understood as allowing those sources to increase hours of operation or production up to permitted levels as market conditions dictate. We note that this does not leave such activities outside the scope of the CAA: if a State concludes that resulting air quality considerations warrant revision to its SIP to add further limitations to a permit, it may exercise its authority to impose them, even in the absence of anything that constitutes a "change" to an existing plant. But we believe that our 1980 conclusion that increases in hours of operation or production at existing plants should not trigger NSR remains the better construction of the CAA. That being the case, we now believe that the fact that such increases may occur after replacement of equipment that does not present an opportune time for the installation of controls should change that conclusion.

To summarize: with respect to existing sources, the purpose of the NSR provisions is simply to require the installation of controls at the appropriate and opportune time. The kind of replacements that automatically fall within the equipment replacement provision established today do not represent such an appropriate and opportune time. Accordingly, and given that it is consistent with the meaning of "change" to treat this kind of replacement as not being a "change," we believe excluding them on that basis from the definition of "modification" as used in the NSR program is well calculated to serve all of the policies of the NSR provisions of the CAA, and is therefore a legitimate exercise of our discretion under *Chevron, U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), to construe an ambiguous term. Likewise, we believe this

approach is consistent with the holding in the *WEPCO* case, and with some though not all of that case's reasoning.

Today's rule treats the activities excluded from the definition of "change" as a category of "routine maintenance, repair and replacement". We received many comments as to whether we can and should adopt the ERP as an expansion of the RMRR exclusion. We believe it is appropriate to expand the former RMRR exception. Before promulgation of today's rule, we interpreted the phrase "routine maintenance, repair and replacement" to be limited to the day-to-day maintenance and repair of equipment and the replacement of relatively small parts of a plant that frequently require replacement. Today we are expanding the former definition of RMRR through this rulemaking to include other activities covered by the 20 percent cost threshold that are needed to facilitate the efficiency, reliability and safety of affected sources.

We believe it is appropriate to add one final note regarding the fact that this approach represents a change from the approach we have taken in the recent past. As the Supreme Court explained in *Chevron*, where it upheld a considerably more significant shift in the Agency's understanding of Title I of the CAA, to wit, the scope of the term "stationary source," there is nothing inherently suspect about a change of approach of this type by an expert Agency seeking to interpret a technical statutory term so as best to accommodate competing interests that Congress has charged the Agency with reconciling.

In section 101 of the CAA, Congress stated that Title I of the CAA has a dual purpose: "to protect and enhance the quality of the Nation's air resources *so as to promote the public health and welfare and the productive capacity of its population*" (emphasis added). This duality is reiterated in the statement of purpose of the PSD provisions and in the House Report accompanying the 1977 Amendments in connection with the non-attainment provisions. *See* sec. 160(1) (purposes of the PSD program are, inter alia, "to protect public health and welfare from any actual or potential adverse effect" of air pollution and "to insure that economic growth will continue to occur consistent with the preservation of existing clean air resources"); *H.R. Rep. No. 95-294, p. 211* (The "two main purposes" of the non-attainment permitting program are "(1) to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow States greater flexibility for the former purpose than EPA's present interpretative regulations afford").

More specifically, with regard to the question at issue here, Congress directed EPA not to apply NSR preconstruction permitting requirements to existing plants as a general matter, but to apply them to "modifications." Both directives are entitled to receive appropriate weight.

In these circumstances, changes in an Agency's understanding informed by greater experience are not only not surprising, they are to be expected. Effectuating these underlying Congressional commands requires a careful weighing and accommodation of the competing

considerations underlying them. Sensitivity to unintended consequences, and a willingness to adjust policies in a manner informed by a better understanding of those consequences, are a central element of the responsibilities of an Agency given such a charge. As the *Chevron* Court explained:

> Our review of the EPA's varying interpretations of the word "source"—both before and after the 1977 Amendments—convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly—not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena. The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute. 467 U.S. at 863-64.

The Court went on to point out:

> In these cases the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and com-

> plex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies. Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. * * *
>
> [A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices --resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities. * * *
>
> We hold that the EPA's definition of the term "source" is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth. 'The Regulations which the Administrator has adopted provide what the agency could allowably view as * * * [an] effective reconciliation of these twofold ends. * * *'

Id. at 865-66 (citations and footnotes omitted). We believe the same reasoning applies here, and makes it entirely appropriate for us to adopt the equipment replacement provision today.

2. Why Today's Rule Appropriately Implements the Clean Air Act's Definition of Modification

As noted above, the modification provisions of the NSR program in parts C and D of title I of the CAA are based on the definition of modification in section 111(a)(4) of the CAA. The term "modification" means "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." As we observed in the notice of proposed rulemaking for this rule, that definition contemplates that you will first determine whether a physical or operational change will occur. If so, then you proceed to determine whether the physical or operational change will result in an emissions increase over baseline levels.

Real-world, common-sense usage of the word "change" in "physical change" and "change in the method of operation" shows that "change" is susceptible to multiple meanings. As we have noted previously, "EPA has always recognized that Congress did not intend that every activity at an existing facility be considered a physical or operational change for purposes of NSR." 57 FR 32,314, 32,319 (July 21, 1992). Conceivably, "change" could encompass a range of activities from periodically replacing filters in production machinery, to once in-a-lifetime anticipated replacement of a component, to complete replacement of a production unit.

For example, all cars must periodically have their oil "changed." When considered from one perspective, this activity does represent a "change" because old oil is removed and new oil is added. From another perspective, however, this activity would not be considered a change because it does not alter any significant characteristic of the car.

More to the point, chemical and pharmaceutical manufacturing operations often are designed, operated, and permitted as "multi-function" facilities. These facilities have numerous pieces of equipment (such as storage tanks, reactors, distillation columns, centrifuges, filter dryers, etc.) that can be reconfigured to accommodate a wide variety of products and operating conditions. When switching from product X to product Y, a plant can make substantial "changes" in the types of equipment used, the processing conditions, and the raw materials, reagents, solvents, and other processing materials. In this case, the same basic equipment is used to make a wide variety of end products. But, as long as the facility is operated as designed and permitted, we would not consider (and have not considered over the 20+ year life of the NSR program) such changes to be physical or operational "changes" for purposes of administering the NSR program.

Similarly, manufacturing equipment often is built with expendable components. For example, industrial gas turbines, such as those used to drive compressors on natural gas pipelines, regularly need to have components replaced as they wear out due to the high temperature and pressure conditions inside the turbine. In fact, these gas turbines are built with the knowledge and

expectation that such replacements will be needed. In recognition of this fact, under the New Source Performance Standard for gas turbines, 40 CFR part 60, subpart GG, we have concluded that "replacement of stator blades, turbine nozzles, turbine buckets, fuel nozzles, combustion chambers, seals, and shaft packings' are not "changes" for regulatory purposes. See EPA-450/2-77-017a, background support document for Subpart GG. Such replacements are akin to getting a new set of brakes on a car—not something that happens often, not an activity that is necessarily inexpensive, but plainly an activity that is an expected part of maintaining and operating the facility and one that does not represent an alteration of the affected process unit.

As the preceding examples suggest, identifying activities that are "changes" for NSR purposes—and thus potentially trigger the need for an NSR permit—requires the exercise of Agency expertise. The application of agency expertise to the interpretation of this statutory term is the classic situation in which an agency is accorded deference under *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984).

Historically, we have asserted the power to interpret the relevant statutory terms. For example, even though both the NSPS and NSR programs incorporate the definition of "modification" from section 111, from the outset EPA has adopted quite disparate readings of the term in our rules. *See* 57 FR 32314, 32316 (July 21, 1992) (WEPCO rule discussion of how emission increases are calculated differently for the NSPS and NSR programs). The NSPS program requires a change to result in an increase in the hourly potential to emit of

the facility. 40 CFR 60.14(a)-(b). In contrast, under NSR, we require an increase in annual emissions. *E.g.*, 40 CFR 51.165(a)(1)(x). These disparate tests reflect the Agency's view that the statutory term "modification" must be construed with a view to what makes sense in particular statutory context, and are not obvious on their face.

The exclusions from NSR we adopted in 1980 also reflect the exercise of the *Chevron* discretion. Not only did we adopt the RMRR exclusion at that time, but we also adopted exclusions for increases in the hours of operation, fuel changes, and raw material changes. Only the RMRR exclusion arguably could be justified as *de minimis*. For example, by doubling hours of operation, a 500 tpy emitting plant could conceivably double its emissions.[13] The extra 500 tpy is far above any level EPA has ever thought justifiable as *de minimis*. *E.g.*, 40 CFR 51.166(b)(23)(i) (definition of "significant"). Nor is it likely that these other exclusions could be based on some inherent power to adopt categorical exclusions from the CAA's commands. See *Alabama Power Company* v. *Costle*, 636 F.2d 323, 359 (D.C. Cir. 1980) ("categorical exemptions * * * are not favored"). Accordingly, these other exclusions must be justified as an exercise of *Chevron* discretion.

As noted previously, in 1977 when Congress incorporated by reference into the NSR program the preexisting NSPS statutory definition of modification, EPA had already adopted and had been administering regula-

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[13] As discussed below, our regulations provided a comparable exclusion from NSPS at the time of the 1977 Amendments that established the NSR program.

tions and policy under the NSPS program related to the meaning of the term "modification." Our rules and policy provided that certain significant activities did not constitute physical or operational changes under the NSPS program prior to 1977 (or, for that matter, under the NSPS program as administered today). In addition to the gas turbine example provided above, perhaps the best indication that EPA did not consider the terms "modification" or "change" to cover everything other than *de minimis* activities is the exclusion for production rate increases under the NSPS program. 40 CFR 60.14(e)(2).

Under this provision, projects valued at millions of dollars can be implemented—with no limitations on the nature of the project—without triggering applicable NSPSs. For example, up to 10 percent of the asset value of affected operations at a kraft pulp mill can be invested in a project without triggering the applicable NSPS, 40 CFR part 60, subpart BB. The affected facilities at a kraft pulp mill typically are valued in excess of $100 million. Therefore, an owner or operator can implement projects costing millions of dollars without triggering the applicable NSPS. This holds true regardless of the nature of the project—it can be a "like-kind" replacement of the kind addressed by today's rule or it can result in a substantial change in the nature of the operation. Thus, under the NSPS program that existed when Congress enacted NSR and incorporated into NSR the applicable NSPS definitions, projects of substantial cost that result in substantial change in affected facilities were not considered "changes." The same is true under the NSPS program as it stands today.

We recognize that the Agency previously has not specifically asserted that our interpretation of "change" and the exclusions from NSR are based on an exercise of *Chevron* discretion. In some instances, such as in a decision of the EAB, *In re Tennessee Valley Authority*, 9 E.A.D. 357 (EAB 2000), and in briefs in various enforcement-related cases, we have previously interpreted "change" such that virtually all changes, even trivial ones, are encompassed by the CAA. Thus, we generally interpreted the exclusion as being limited to *de minimis* circumstances. However, EPA does have the authority to interpret these key terms through rulemaking. Upon further consideration of the history of our actions, the statute, and its legislative history, EPA believes that a different view is permissible, and, for policy reasons discussed above, more appropriate. Therefore, we adopt this view prospectively in today's action.[14]

The argument that our authority to exclude certain activities from being modifications under new source review can only be based on a *de minimis* rationale sometimes relies on the word "any" used to modify

[14] We have taken positions in numerous court filings concerning the proper interpretation and usage of key statutory terms, such as "physical change" and "any physical change." These positions were based on permissible constructions of the statute of which the regulated community had fair notice, and correctly reflect the Agency's reasonable accommodation of the Clean Air Act's competing policies in light of its experience at the time it adopted the RMRR exclusion in 1980. The Agency has sought, and has obtained, deference for its interpretations, and, notwithstanding today's adoption of a revised interpretation of the statute and an expansion of the RMRR exclusion, the Agency shall continue to seek deference for those prior interpretations in ongoing enforcement litigation.

"physical change" and "change in the method of operation," pointing to the word "any" in the definition of "modification" as a signal from Congress that the term "change" must be interpreted as encompassing the broadest possible sense of the term. Such an interpretation is not compelled by the language and legislative history of the statute, as demonstrated by the manner in which we have interpreted the word "change" under both the NSPS and the NSR programs.[15]

Nothing in the appellate case law directly disposes of this issue in a manner that prevents a new interpretation today. Two cases, *Alabama Power* and *WEPCO*, are relied on by some commenters to assert that EPA must interpret "modification" and "change" expansively and base all exclusions on a *de minimis* rationale. However, in *Alabama Power*, the issue before the court was the emissions increase portion of the definition of "modification." The court would have allowed *de minimis* increases in emissions to be excluded from requirements applying to "modifications" under new source review but not emissions increases equal to the thresholds set by statute for new construction. 636 F.2d at 399-400. The court did not have before it the issue of what is a "change" and did not decide this issue.

In *WEPCO*, both parties advanced the view that the statute was clear on its face. EPA advanced the

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[15] We note that the word "any" is simply a modifier that does not change the meaning of the word it modifies. For example, using the term "any" to modify the word "car" does not somehow change or expand the meaning of the word "car." "Any" simply means that, once you have decided what a car is, then all objects meeting the definition are encompassed.

view that the term "modification" is necessarily broad, and that only *de minimis* departures are appropriate. *WEPCO* asserted that the plain meaning of the term "physical change" allowed for the five large scale rehabilitation projects it contemplated at its Port Washington plant. The *WEPCO* court held that the rehabilitation projects at issue were too large to reasonably conclude that they should not be treated as physical changes. The court's holding that the statute did not require the interpretation advanced by *WEPCO* does not deny EPA the discretion to decide to adopt a different, reasonable interpretation of the term "modification."

While the Court in *WEPCO* decided that the projects in that case were physical changes, the decision in *WEPCO* does not answer the question of where to draw the line between activities that should and should not be considered "changes." Nevertheless, contrary to the suggestions of several commenters, the projects at issue in *WEPCO* would have cost more than the 20 percent of replacement cost threshold selected today and, barring other applicable exclusions, would have been subject to case-by-case review in the PSD program. *See* section III.D above.[16]

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[16] We note that decisions recently were rendered in two of the Agency's pending NSR enforcement cases in the utility sector. In both cases, the Agency asserted that the then existing RMRR exclusion should be applied in a narrow fashion such that only *de minimis* projects should be excluded under that rule. In our case against Ohio Edison in the U.S. District Court for the Southern District of Ohio, the court determined that the disputed projects did not qualify for the existing RMRR exclusion. The Agency sought and received from the court broad deference with regard to the Agency's interpretation of the CAA and the relevant EPA rules. In our case against Duke Energy in

Some commenters argued that, to further the purposes of the statute, any interpretation must result in the eventual elimination of so-called "grandfathered" facilities. We recognize the need to reduce emissions from many existing plants—regardless of whether they are "grandfathered" (because they have never gone through NSR) or whether they have previously gone through NSR but can further reduce their emissions. EPA and States have issued regulations under a variety of statutory provisions to accomplish this goal in the past, and we will continue to do so in the future. We do not believe, however, the modification provisions of the CAA should be interpreted to ensure that all major facilities eventually trigger NSR. In fact, such an interpretation cannot be squared with the plain language of the CAA.

An existing source—whether grandfathered or not—triggers NSR only if it makes a physical or operational change that results in an emissions increase. Thus, a facility can conceivably continue to operate indefinitely without triggering NSR—making as many physical or operational changes as it desires—as long as the changes do not result in emissions increases. This outcome is an unavoidable consequence of the plain stat-

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the U.S. District Court for the Middle District of North Carolina, the court issued a decision on cross motions for summary judgment. The decision took exception with several legal conclusions reached in the Ohio Edison decision and determined that the then existing RMRR exclusion must be applied from the perspective of what projects are routine within the relevant industrial source category. EPA today is adopting prospectively a new interpretation of the CAA and is finalizing a revision to the RMRR regulation at issue in those cases.

utory language and is at odds with the notion that Congress intended that every major source would eventually trigger NSR. Moreover, there is nothing in the legislative history of the 1977 Amendments, which created the NSR program, to suggest that Congress intended to force all then-existing sources to go through NSR. To the extent that some members of Congress expressed that view during the debate over the 1990 amendments, such statements are not probative of what Congress meant in 1977. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185-86 (1994), and cases cited.

In deciding to incorporate by reference the statutory definition of "modification" in section 111, Congress's intent cannot have been to preclude us from adopting an interpretation of "modification" or "change" that differs from one that sweeps in all activities at a source. Under the NSPS program, this interpretation did not apply at the time of the 1977 amendments. When the NSPS definition of "modification" was adopted as part of the NSR program in 1977, the *Congressional Record* explained that this provision, "[i]mplements conference agreement to cover "modification" as well as "construction" by defining "construction" in part C *to conform to usage in other parts of the Act*." 123 Cong. Rec. 36331 (Nov. 1, 1977) (emphasis added). Although we do not assert that the NSPS interpretation is the only one we could have adopted for NSR purposes (we followed quite a different interpretation from 1980 until today) at the very least it delineates a zone of discretion within which EPA may operate.

Our interpretation today of physical or operational change in a flexible way furthers the purposes of the statute. As noted above, Congress made it clear that the CAA in general, and the NSR program in particular, should be administered in a manner that protects the environment and promotes the productive capacity of the nation. CAA section 101(b)(1). The *Chevron* Court recognized Congress' intent and noted that "Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality" when it established the NSR program. *Chevron*, 467 U.S. at 851. Generally, we believe that these goals are best accomplished by providing state and local governments with discretion to make decisions as to what emissions reductions are needed in their jurisdictions to attain and maintain good air quality. *See* CAA section 101(a)(3).

It is now clear that many power plants and industrial facilities must substantially reduce their emissions in order to allow States to meet the stringent Federal air quality standards that the Supreme Court upheld in 2002. Under the CAA, Congress designed a number of regulatory programs that will collectively achieve the necessary reductions. Although the NSR program will effectively limit emissions from new and modified sources, it was not designed to achieve emission reductions from every existing source.

IV. Administrative Requirements for This Rule

A. Executive Order 12866—Regulatory Planning and Review

Under Executive Order 12866 [58 FR 51735 (October 4, 1993)], we must determine whether the regulatory action is "significant" and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, OMB has notified us that it considers this an "economically significant regulatory action" within the meaning of the Executive Order. We have submitted this action

to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record. All written comments from OMB to EPA and any written EPA response to any of those comments are included in the docket listed at the beginning of this notice under **ADDRESSES**. In addition, consistent with Executive Order 12866, we consulted with the State, local and tribal agencies that will be affected by this rule. We have also sought involvement from industry and public interest groups.

B. Executive Order 13132—Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires us to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This final rule does not have federalism implications. Nevertheless, as described in section II.C of this notice, in developing this rule, we consulted with affected parties and interested stakeholders, including State and local authorities, to enable them to provide timely input in the development of this rule. This rule will not have substantial direct effects on the States, on the relationship between the national government and the State and local programs, or on the distribution of

power and responsibilities among the various levels of government, as specified in Executive Order 13132. We expect this rule will result in some expenditures by the States, we expect those expenditures to be limited to $580,000 for the estimated 112 affected reviewing authorities. This estimate reflects the small increase in burden imposed upon reviewing authorities in order for them to revise their State Implementation Plans (SIP). However, this revision provides sources permitted by the States greater certainty in application of the program, which should in turn reduce the overall burden of the program on State and local authorities. Thus, the requirements of Executive Order 13132 do not apply to this rule.

C. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." We believe that this rule does not have tribal implications as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply.

The purpose of today's final rule is to add greater flexibility to the existing major NSR regulations. These changes will benefit reviewing authorities and the regulated community, including any major source owned by a tribal government or located in or near tribal land, by

providing increased certainty as to when the requirements of the major NSR program apply. Taken as a whole, today's rule should result in no added burden or compliance costs and should not substantially change the level of environmental performance achieved under the previous rules and guidance.

We anticipate that initially these changes will result in a small increase in the burden imposed upon reviewing authorities in order for them to be included in the State's SIP. Nevertheless, these options and revisions will ultimately provide greater operational flexibility to sources permitted by the States, which will in turn reduce the overall burden on the program on State and local authorities by reducing the number of required permit modifications. In comparison, no tribal government currently has an approved Tribal Implementation Plan (TIP) under the CAA to implement the NSR program. The Federal government is currently the NSR reviewing authority in Indian country. Thus, tribal governments should not experience added burden, nor should their laws be affected with respect to implementation of this rule. Additionally, although major stationary sources affected by today's rule could be located in or near Indian country and/or be owned or operated by tribal governments, such affected sources would not incur additional costs or compliance burdens as a result of this rule. Instead, the only effect on such sources should be the benefit of the added certainty and flexibility provided by the rule.

We recognize the importance of including tribal outreach as part of the rulemaking process. In addition to affording tribes an opportunity to comment on this

rule through the proposal, on which two tribes did submit comments, we have also alerted tribes of this action through our website and quarterly newsletter. To this point we have not specifically consulted with tribal officials on this rule, but we are committed to work with any tribal government to resolve any issues that we may have overlooked in today's rules and that may have an adverse impact in Indian country.

D. Executive Order 13045—Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that (1) is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonable alternatives that we considered.

This rule is not subject to Executive Order 13045, because we do not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. We believe that, based on our analysis of electric utilities, this rule as a whole will result in equal or better environmental protection than currently provided by the existing regu-

lations, and do so in a more streamlined and effective manner.

E. Paperwork Reduction Act

The information collection requirements in this final rule have been submitted for approval to OMB under the requirements of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* An ICR document has been prepared by EPA (ICR No. 1230.14), and a copy may be obtained from Susan Auby, U.S. Environmental Protection Agency, Office of Environmental Information, Collection Strategies Division (2822T), 1200 Pennsylvania Avenue, NW., Washington, DC 20460-0001, by e-mail at auby.susan@epa.gov, or by calling (202) 566-1672. A copy may also be downloaded off the Internet at *http://www.epa.gov/icr.* The information requirements included in ICR No. 1230.14 are not enforceable until OMB approves them.

The information that ICR No. 1230.14 covers is required for the submittal of a complete permit application for the construction or modification of all major new stationary sources of pollutants in attainment and nonattainment areas, as well as for applicable minor stationary sources of pollutants. This information collection is necessary for the proper performance of EPA's functions, has practical utility, and is not unnecessarily duplicative of information we otherwise can reasonably access. We have reduced, to the extent practicable and appropriate, the burden on persons providing the information to or for EPA. In fact, we feel that this rule will result in less burden on industry and reviewing authori-

ties since it streamlines the process of determining whether a replacement activity is RMRR.

However, according to ICR No. 1230.14, we do anticipate an initial increase in burden for reviewing authorities as a result of the rule changes, to account for revising state implementation plans to incorporate these rule changes. As discussed above, we expect those one-time expenditures to be limited to $580,000 for the estimated 112 affected reviewing authorities. For the number of respondent reviewing authorities, the analysis uses the 112 reviewing authorities count used by other permitting ICR's for the one-time tasks (for example, SIP revisions).

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purpose of responding to the information collection; adjust existing ways to comply with any previously applicable instructions and requirements; train personnel to respond to a collection of information; search existing data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15. We will continue to present OMB control numbers in a

consolidated table format to be codified in 40 CFR part 9 of the Agency's regulations, and in each CFR volume containing EPA regulations. The table lists the section numbers with reporting and recordkeeping requirements, and the current OMB control numbers. This listing of the OMB control numbers and their subsequent codification in the CFR satisfy the requirements of the *Paperwork Reduction Act* (44 U.S.C. 3501 *et seq.*) and OMB's implementing regulations at 5 CFR part 1320.

F. Regulatory Flexibility Analysis

We determined it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule. We have also determined that this rule will not have a significant economic impact on a substantial number of small entities. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) Any small business employing fewer than 500 employees; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's rule on small entities, EPA has concluded that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory

alternatives "which minimize any significant economic impact of this rule on small entities." 5 U.S.C. Sections 603 and 604. Thus, an agency may conclude that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule. Today's rule will not have a significant economic impact on a substantial number of small entities because it will decrease the regulatory burden of the existing regulations and have a positive effect on all small entities subject to the rule. This rule improves operational flexibility for owners or operators of major stationary sources and clarifies applicable requirements for determining if a change qualifies as a major modification. We have therefore concluded that today's rule will relieve regulatory burden for all small entities.

G. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of UMRA, we generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires us to identify and consider a reasonable number of regulatory alternatives

and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows us to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted.

Before we establish any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, we must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of our regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We believe these rule changes will actually reduce the regulatory burden associated with the major NSR program by improving the operational flexibility of owners or operators and clarifying the requirements. Because the program changes provided in the rule are not expected to result in a significant increase in the expenditure by State, local, and tribal governments, or the private sector, we have not prepared a budgetary impact statement or specifically addressed the selection of the least costly, most cost-effective, or least burdensome alternative. Because small governments will not be sig-

nificantly or uniquely affected by this rule, we are not required to develop a plan with regard to small governments. Therefore, this rule is not subject to the requirements of section 203 of the UMRA.

H. National Technology Transfer and Advancement Act of 1995

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law No. 104-113, section 12(d) (15 U.S.C. 272 *note*) directs us to use voluntary consensus standards (VCS) in our regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. VCS are technical standards (for example, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs us to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable VCS.

Although this rule does involve the use of technical standards, it does not preclude the State, local, and tribal reviewing agencies from using VCS. Today's rule is an improvement of the existing NSR permitting program. As such, it only ensures that promulgated technical standards are considered and appropriate controls are installed, prior to the construction of major sources of air emissions. Therefore, we are not considering the use of any VCS in today's rule.

I. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This rule is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the supply, distribution or use of energy.

Today's rule improves the ability of sources to maintain the reliability of production facilities, and effectively utilize and improve existing capacity.

J. Executive Order 12988—Civil Justice Reform

This final rule does not have any preemptive or retroactive effect. This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

V. Effective Date for Today's Requirements

All of these changes will take effect in the Federal PSD program (codified at § 52.21) on December 26, 2003. This means that these rules will apply on December 26, 2003, in any area without an approved PSD program, for which we are the reviewing authority, or for which we have delegated our authority to issue permits to a State or local reviewing authority.

To be approvable under the SIP, State and local agency programs implementing part C (PSD permit

program in § 51.166) or part D (nonattainment NSR permit program in § 51.165) must include today's changes as minimum program elements. State and local agencies should assure that any program changes under § § 51.165 and 51.166 are consistently accounted for in other SIP planning measures. State and local agencies must adopt and submit revisions to their part 51 permitting programs implementing these minimum program elements no later than October 27, 2006. That is, for both nonattainment and attainment areas, the SIP revisions must be adopted and submitted within 3 years from today. The CAA does not specify a date for submission of SIPs when we revise the PSD and NSR rules. We believe it is appropriate to establish a date analogous to the date for submission of new SIPs when a NAAQS is promulgated or revised. Under section 110(a)(1) of the CAA, as amended in 1990, that date is 3 years from promulgation or revision of the NAAQS. Accordingly, we have established 3 years from today's revisions as the required date for submission of conforming SIP revisions.

Today's rule revises the Federal PSD program located at 40 CFR 52.21 to include the new equipment replacement provision of the RMRR exclusion. The part 52 regulations governing Federal permitting programs include the Federal PSD rule at 40 CFR 52.21 as well as the various sections of subparts C through DDD of part 52 that incorporate the Federal permitting program by reference for those jurisdictions where EPA applies part 52.21 as a Federal Implementation Plan because such jurisdictions lack an approved SIP to implement the PSD program. Because today's final rule adds additional paragraphs to the part 52.21 rules, we will be re-

vising the references in subparts C through DDD to appropriately reflect the program that applies. This final action will be taken in a separate **Federal Register** notice and will not change the effective date of today's final changes.

VI. Statutory Authority

The statutory authority for this action is provided by sections 101, 111, 114, 116, and 301 of the CAA as amended (42 U.S.C. 7401, 7411, 7414, 7416, and 7601). This rulemaking is also subject to section 307(d) of the CAA (42 U.S.C. 7407(d)).

List of Subjects in 40 CFR Parts 51 and 52

Environmental protection, Administrative practices and procedures, Air pollution control, Intergovernmental relations.

Dated: August 27, 2003.

Marianne Lamont Horinko,

Acting Administrator.

• For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 51—[AMENDED]

• 1. The authority citation for part 51 continues to read as follows:

Authority: 23 U.S.C. 101; 42 U.S.C. 7401-7671q.

Subpart I—[Amended]

- 2. Section 51.165 is amended:
- a. By revising paragraph (a)(1)(v)(C)(1).
- b. By adding paragraphs (a)(1)(xliii) through (xlvi) and paragraph (h).

The revision and additions read as follows:

§ 51.165 Permit requirements.

(a) * * *

(1) * * *

(v) * * *

(C) * * *

(1) Routine maintenance, repair and replacement. Routine maintenance, repair and replacement shall include, but not be limited to, any activity(s) that meets the requirements of the equipment replacement provisions contained in paragraph (h) of this section; * * *.

* * * * *

(xliii)(A) In general, **process unit** means any collection of structures and/or equipment that processes, assembles, applies, blends, or otherwise uses material inputs to produce or store an intermediate or a completed product. A single stationary source may contain more than one process unit, and a process unit may contain more than one emissions unit.

(B) Pollution control equipment is not part of the process unit, unless it serves a dual function as both process and control equipment. Administrative and warehousing facilities are not part of the process unit.

(C) For replacement cost purposes, components shared between two or more process units are proportionately allocated based on capacity.

(D) The following list identifies the process units at specific categories of stationary sources.

(1) For a steam electric generating facility, the process unit consists of those portions of the plant that contribute directly to the production of electricity. For example, at a pulverized coal-fired facility, the process unit would generally be the combination of those systems from the coal receiving equipment through the emission stack (excluding post-combustion pollution controls), including the coal handling equipment, pulverizers or coal crushers, feedwater heaters, ash handling, boiler, burners, turbine-generator set, condenser, cooling tower, water treatment system, air preheaters, and operating control systems. Each separate generating unit is a separate process unit.

(2) For a petroleum refinery, there are several categories of process units: those that separate and/or distill petroleum feedstocks; those that change molecular structures; petroleum treating processes; auxiliary facilities, such as steam generators and hydrogen production units; and those that load, unload, blend or store intermediate or completed products.

(3) For an incinerator, the process unit would consist of components from the feed pit or refuse pit to the stack, including conveyors, combustion devices, heat exchangers and steam generators, quench tanks, and fans.

(xliv) *Functionally equivalent* component means a component that serves the same purpose as the replaced component.

(xlv) *Fixed capital cost* means the capital needed to provide all the depreciable components. "Depreciable components" refers to all components of fixed capital cost and is calculated by subtracting land and working capital from the total capital investment, as defined in paragraph (a)(1)(xlvi) of this section.

(xlvi) *Total capital investment* means the sum of the following: All costs required to purchase needed process equipment (purchased equipment costs); the costs of labor and materials for installing that equipment (direct installation costs); the costs of site preparation and buildings; other costs such as engineering, construction and field expenses, fees to contractors, startup and performance tests, and contingencies (indirect installation costs); land for the process equipment; and working capital for the process equipment.

* * * * *

(h) *Equipment replacement provision.* Without regard to other considerations, routine maintenance, repair and replacement includes, but is not limited to, the replacement of any component of a process unit with

an identical or functionally equivalent component(s), and maintenance and repair activities that are part of the replacement activity, provided that all of the requirements in paragraphs (h)(1) through (3) of this section are met.

(1) Capital Cost threshold for Equipment Replacement. (i) For an *electric utility steam generating unit*, as defined in § 51.165(a)(1)(xx), the fixed capital cost of the replacement component(s) plus the cost of any associated maintenance and repair activities that are part of the replacement shall not exceed 20 percent of the replacement value of the process unit, at the time the equipment is replaced. For a process unit that is not an electric utility steam generating unit the fixed capital cost of the replacement component(s) plus the cost of any associated maintenance and repair activities that are part of the replacement shall not exceed 20 percent of the replacement value of the process unit, at the time the equipment is replaced.

(ii) In determining the replacement value of the process unit; and, except as otherwise allowed under paragraph (h)(1)(iii) of this section, the owner or operator shall determine the replacement value of the process unit on an estimate of the fixed capital cost of constructing a new process unit, or on the current appraised value of the process unit.

(iii) As an alternative to paragraph (h)(1)(ii) of this section for determining the replacement value of a process unit, an owner or operator may choose to use insurance value (where the insurance value covers only complete replacement), investment value adjusted for infla-

tion, or another accounting procedure if such procedure is based on Generally Accepted Accounting Principles, provided that the owner or operator sends a notice to the reviewing authority. The first time that an owner or operator submits such a notice for a particular process unit, the notice may be submitted at any time, but any subsequent notice for that process unit may be submitted only at the beginning of the process unit's fiscal year. Unless the owner or operator submits a notice to the reviewing authority, then paragraph (h)(1)(ii) of this section will be used to establish the replacement value of the process unit. Once the owner or operator submits a notice to use an alternative accounting procedure, the owner or operator must continue to use that procedure for the entire fiscal year for that process unit. In subsequent fiscal years, the owner or operator must continue to use this selected procedure unless and until the owner or operator sends another notice to the reviewing authority selecting another procedure consistent with this paragraph or paragraph (h)(1)(ii) of this section at the beginning of such fiscal year.

(2) *Basic design parameters.* The replacement does not change the basic design parameter(s) of the process unit to which the activity pertains.

(i) Except as provided in paragraph (h)(2)(iii) of this section, for a process unit at a steam electric generating facility, the owner or operator may select as its basic design parameters either maximum hourly heat input and maximum hourly fuel consumption rate or maximum hourly electric output rate and maximum steam flow rate. When establishing fuel consumption specifications in terms of weight or volume, the mini-

mum fuel quality based on British Thermal Units content shall be used for determining the basic design parameter(s) for a coal-fired electric utility steam generating unit.

(ii) Except as provided in paragraph (h)(2)(iii) of this section, the basic design parameter(s) for any process unit that is not at a steam electric generating facility are maximum rate of fuel or heat input, maximum rate of material input, or maximum rate of product output. Combustion process units will typically use maximum rate of fuel input. For sources having multiple end products and raw materials, the owner or operator should consider the primary product or primary raw material when selecting a basic design parameter.

(iii) If the owner or operator believes the basic design parameter(s) in paragraphs (h)(2)(i) and (ii) of this section is not appropriate for a specific industry or type of process unit, the owner or operator may propose to the reviewing authority an alternative basic design parameter(s) for the source's process unit(s). If the reviewing authority approves of the use of an alternative basic design parameter(s), the reviewing authority shall issue a permit that is legally enforceable that records such basic design parameter(s) and requires the owner or operator to comply with such parameter(s).

(iv) The owner or operator shall use credible information, such as results of historic maximum capability tests, design information from the manufacturer, or engineering calculations, in establishing the magnitude of the basic design parameter(s) specified in paragraphs (h)(2)(i) and (ii) of this section.

(v) If design information is not available for a process unit, then the owner or operator shall determine the process unit's basic design parameter(s) using the maximum value achieved by the process unit in the five-year period immediately preceding the planned activity.

(vi) Efficiency of a process unit is not a basic design parameter.

(3) The replacement activity shall not cause the process unit to exceed any emission limitation, or operational limitation that has the effect of constraining emissions, that applies to the process unit and that is legally enforceable.

- 3. Section 51.166 is amended:
- a. By revising paragraph (b)(2)(iii)(a).
- b. By adding paragraphs (b)(53) through (56) and paragraph (y).

The revision and additions read as follows:

§ 51.166 Prevention of significant deterioration of air quality.

(b) * * *

(2) * * *

(iii) * * *

(a) Routine maintenance, repair and replacement. Routine maintenance, repair and replacement shall include, but not be limited to, any activity(s) that meets

the requirements of the equipment replacement provisions contained in paragraph (y) of this section; * * *.

* * * * *

(53)(i) In general, *process unit* means any collection of structures and/or equipment that processes, assembles, applies, blends, or otherwise uses material inputs to produce or store an intermediate or a completed product. A single stationary source may contain more than one process unit, and a process unit may contain more than one emissions unit.

(ii) Pollution control equipment is not part of the process unit, unless it serves a dual function as both process and control equipment. Administrative and warehousing facilities are not part of the process unit.

(iii) For replacement cost purposes, components shared between two or more process units are proportionately allocated based on capacity.

(iv) The following list identifies the process units at specific categories of stationary sources.

(a) For a steam electric generating facility, the process unit consists of those portions of the plant that contribute directly to the production of electricity. For example, at a pulverized coal-fired facility, the process unit would generally be the combination of those systems from the coal receiving equipment through the emission stack (excluding post-combustion pollution controls), including the coal handling equipment, pulverizers or coal crushers, feedwater heaters, ash handling, boiler, burners, turbine-generator set, condenser,

cooling tower, water treatment system, air preheaters, and operating control systems. Each separate generating unit is a separate process unit.

(b) For a petroleum refinery, there are several categories of process units: those that separate and/or distill petroleum feedstocks; those that change molecular structures; petroleum treating processes; auxiliary facilities, such as steam generators and hydrogen production units; and those that load, unload, blend or store intermediate or completed products.

(c) For an incinerator, the process unit would consist of components from the feed pit or refuse pit to the stack, including conveyors, combustion devices, heat exchangers and steam generators, quench tanks, and fans.

(54) *Functionally equivalent component* means a component that serves the same purpose as the replaced component.

(55) *Fixed capital cost* means the capital needed to provide all the depreciable components. "Depreciable components" refers to all components of fixed capital cost and is calculated by subtracting land and working capital from the total capital investment, as defined in paragraph (b)(56) of this section.

(56) *Total capital investment* means the sum of the following: all costs required to purchase needed process equipment (purchased equipment costs); the costs of labor and materials for installing that equipment (direct installation costs); the costs of site preparation and buildings; other costs such as engineering, construction

and field expenses, fees to contractors, startup and performance tests, and contingencies (indirect installation costs); land for the process equipment; and working capital for the process equipment.

* * * * *

(y) *Equipment replacement provision.* Without regard to other considerations, routine maintenance, repair and replacement includes, but is not limited to, the replacement of any component of a process unit with an identical or functionally equivalent component(s), and maintenance and repair activities that are part of the replacement activity, provided that all of the requirements in paragraphs (y)(1) through (3) of this section are met.

(1) *Capital Cost threshold for Equipment Replacement.* (i) For an *electric utility steam generating unit*, as defined in § 51.166(b)(30), the fixed capital cost of the replacement component(s) plus the cost of any associated maintenance and repair activities that are part of the replacement shall not exceed 20 percent of the replacement value of the process unit, at the time the equipment is replaced. For a process unit that is not an electric utility steam generating unit the fixed capital cost of the replacement component(s) plus the cost of any associated maintenance and repair activities that are part of the replacement shall not exceed 20 percent of the replacement value of the process unit, at the time the equipment is replaced.

(ii) In determining the replacement value of the process unit; and, except as otherwise allowed under paragraph (y)(1)(iii) of this section, the owner or opera-

tor shall determine the replacement value of the process unit on an estimate of the fixed capital cost of constructing a new process unit, or on the current appraised value of the process unit.

(iii) As an alternative to paragraph (y)(1)(ii) of this section for determining the replacement value of a process unit, an owner or operator may choose to use insurance value (where the insurance value covers only complete replacement), investment value adjusted for inflation, or another accounting procedure if such procedure is based on Generally Accepted Accounting Principles, provided that the owner or operator sends a notice to the reviewing authority. The first time that an owner or operator submits such a notice for a particular process unit, the notice may be submitted at any time, but any subsequent notice for that process unit may be submitted only at the beginning of the process unit's fiscal year. Unless the owner or operator submits a notice to the reviewing authority, then paragraph (y)(1)(ii) of this section will be used to establish the replacement value of the process unit. Once the owner or operator submits a notice to use an alternative accounting procedure, the owner or operator must continue to use that procedure for the entire fiscal year for that process unit. In subsequent fiscal years, the owner or operator must continue to use this selected procedure unless and until the owner or operator sends another notice to the reviewing authority selecting another procedure consistent with this paragraph or paragraph (y)(1)(ii) of this section at the beginning of such fiscal year.

(2) *Basic design parameters.* The replacement does not change the basic design parameter(s) of the process unit to which the activity pertains.

(i) Except as provided in paragraph (y)(2)(iii) of this section, for a process unit at a steam electric generating facility, the owner or operator may select as its basic design parameters either maximum hourly heat input and maximum hourly fuel consumption rate or maximum hourly electric output rate and maximum steam flow rate. When establishing fuel consumption specifications in terms of weight or volume, the minimum fuel quality based on British Thermal Units content shall be used for determining the basic design parameter(s) for a coal-fired electric utility steam generating unit.

(ii) Except as provided in paragraph (y)(2)(iii) of this section, the basic design parameter(s) for any process unit that is not at a steam electric generating facility are maximum rate of fuel or heat input, maximum rate of material input, or maximum rate of product output. Combustion process units will typically use maximum rate of fuel input. For sources having multiple end products and raw materials, the owner or operator should consider the primary product or primary raw material when selecting a basic design parameter.

(iii) If the owner or operator believes the basic design parameter(s) in paragraphs (y)(2)(i) and (ii) of this section is not appropriate for a specific industry or type of process unit, the owner or operator may propose to the reviewing authority an alternative basic design parameter(s) for the source's process unit(s). If the re-

viewing authority approves of the use of an alternative basic design parameter(s), the reviewing authority shall issue a permit that is legally enforceable that records such basic design parameter(s) and requires the owner or operator to comply with such parameter(s).

(iv) The owner or operator shall use credible information, such as results of historic maximum capability tests, design information from the manufacturer, or engineering calculations, in establishing the magnitude of the basic design parameter(s) specified in paragraphs (y)(2)(i) and (ii) of this section.

(v) If design information is not available for a process unit, then the owner or operator shall determine the process unit's basic design parameter(s) using the maximum value achieved by the process unit in the five-year period immediately preceding the planned activity.

(vi) Efficiency of a process unit is not a basic design parameter.

(3) The replacement activity shall not cause the process unit to exceed any emission limitation, or operational limitation that has the effect of constraining emissions, that applies to the process unit and that is legally enforceable.

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

Subpart A—[Amended]

2. Section 52.21 is amended:

• a. By revising paragraph (b)(2)(iii)(*a*).

• b. By adding paragraphs (b)(55) through (58) and paragraph (cc).

The revision and additions read as follows:

§ 52.21 Prevention of significant deterioration of air quality.

(b) * * *

(2) * * *

(iii) * * *

(*a*) Routine maintenance, repair and replacement. Routine maintenance, repair and replacement shall include, but not be limited to, any activity(s) that meets the requirements of the equipment replacement provisions contained in paragraph (cc) of this section;

* * * * *

(55)(i) In general, *process unit* means any collection of structures and/or equipment that processes, assembles, applies, blends, or otherwise uses material inputs to produce or store an intermediate or a completed product. A single stationary source may contain more than one process unit, and a process unit may contain more than one emissions unit.

(ii) Pollution control equipment is not part of the process unit, unless it serves a dual function as both process and control equipment. Administrative and warehousing facilities are not part of the process unit.

(iii) For replacement cost purposes, components shared between two or more process units are proportionately allocated based on capacity.

(iv) The following list identifies the process units at specific categories of stationary sources.

(*a*) For a steam electric generating facility, the process unit consists of those portions of the plant that contribute directly to the production of electricity. For example, at a pulverized coal-fired facility, the process unit would generally be the combination of those systems from the coal receiving equipment through the emission stack (excluding post-combustion pollution controls), including the coal handling equipment, pulverizers or coal crushers, feedwater heaters, ash handling, boiler, burners, turbine-generator set, condenser, cooling tower, water treatment system, air preheaters, and operating control systems. Each separate generating unit is a separate process unit.

(*b*) For a petroleum refinery, there are several categories of process units: those that separate and/or distill petroleum feedstocks; those that change molecular structures; petroleum treating processes; auxiliary facilities, such as steam generators and hydrogen production units; and those that load, unload, blend or store intermediate or completed products.

(*c*) For an incinerator, the process unit would consist of components from the feed pit or refuse pit to the stack, including conveyors, combustion devices, heat exchangers and steam generators, quench tanks, and fans.

(56) *Functionally equivalent* component means a component that serves the same purpose as the replaced component.

(57) *Fixed capital cost* means the capital needed to provide all the depreciable components. "Depreciable components" refers to all components of fixed capital cost and is calculated by subtracting land and working capital from the total capital investment, as defined in paragraph (b)(58) of this section.

(58) *Total capital investment* means the sum of the following: all costs required to purchase needed process equipment (purchased equipment costs); the costs of labor and materials for installing that equipment (direct installation costs); the costs of site preparation and buildings; other costs such as engineering, construction and field expenses, fees to contractors, startup and performance tests, and contingencies (indirect installation costs); land for the process equipment; and working capital for the process equipment.

* * * * *

(cc) Without regard to other considerations, routine maintenance, repair and replacement includes, but is not limited to, the replacement of any component of a process unit with an identical or functionally equivalent

component(s), and maintenance and repair activities that are part of the replacement activity, provided that all of the requirements in paragraphs (cc)(1) through (3) of this section are met.

(1) *Capital cost threshold for equipment replacement.* (i) For an *electric utility steam generating unit*, as defined in § 52.21(b)(31), the fixed capital cost of the replacement component(s) plus the cost of any associated maintenance and repair activities that are part of the replacement shall not exceed 20 percent of the replacement value of the process unit, at the time the equipment is replaced. For a process unit that is not an electric utility steam generating unit the fixed capital cost of the replacement component(s) plus the cost of any associated maintenance and repair activities that are part of the replacement shall not exceed 20 percent of the replacement value of the process unit, at the time the equipment is replaced.

(ii) In determining the replacement value of the process unit; and, except as otherwise allowed under paragraph (cc)(1)(iii) of this section, the owner or operator shall determine the replacement value of the process unit on an estimate of the fixed capital cost of constructing a new process unit, or on the current appraised value of the process unit.

(iii) As an alternative to paragraph (cc)(1)(ii) of this section for determining the replacement value of a process unit, an owner or operator may choose to use insurance value (where the insurance value covers only complete replacement), investment value adjusted for inflation, or another accounting procedure if such proce-

dure is based on Generally Accepted Accounting Principles, provided that the owner or operator sends a notice to the reviewing authority. The first time that an owner or operator submits such a notice for a particular process unit, the notice may be submitted at any time, but any subsequent notice for that process unit may be submitted only at the beginning of the process unit's fiscal year. Unless the owner or operator submits a notice to the reviewing authority, then paragraph (cc)(1)(ii) of this section will be used to establish the replacement value of the process unit. Once the owner or operator submits a notice to use an alternative accounting procedure, the owner or operator must continue to use that procedure for the entire fiscal year for that process unit. In subsequent fiscal years, the owner or operator must continue to use this selected procedure unless and until the owner or operator sends another notice to the reviewing authority selecting another procedure consistent with this paragraph or paragraph (cc)(1)(ii) of this section at the beginning of such fiscal year.

(2) *Basic design parameters.* The replacement does not change the basic design parameter(s) of the process unit to which the activity pertains.

(i) Except as provided in paragraph (cc)(2)(iii) of this section, for a process unit at a steam electric generating facility, the owner or operator may select as its basic design parameters either maximum hourly heat input and maximum hourly fuel consumption rate or maximum hourly electric output rate and maximum steam flow rate. When establishing fuel consumption specifications in terms of weight or volume, the minimum fuel quality based on British Thermal Units con-

tent shall be used for determining the basic design parameter(s) for a coal-fired electric utility steam generating unit.

(ii) Except as provided in paragraph (cc)(2)(iii) of this section, the basic design parameter(s) for any process unit that is not at a steam electric generating facility are maximum rate of fuel or heat input, maximum rate of material input, or maximum rate of product output. Combustion process units will typically use maximum rate of fuel input. For sources having multiple end products and raw materials, the owner or operator should consider the primary product or primary raw material when selecting a basic design parameter.

(iii) If the owner or operator believes the basic design parameter(s) in paragraphs (cc)(2)(i) and (ii) of this section is not appropriate for a specific industry or type of process unit, the owner or operator may propose to the reviewing authority an alternative basic design parameter(s) for the source's process unit(s). If the reviewing authority approves of the use of an alternative basic design parameter(s), the reviewing authority shall issue a permit that is legally enforceable that records such basic design parameter(s) and requires the owner or operator to comply with such parameter(s).

(iv) The owner or operator shall use credible information, such as results of historic maximum capability tests, design information from the manufacturer, or engineering calculations, in establishing the magnitude of the basic design parameter(s) specified in paragraphs (cc)(2)(i) and (ii) of this section.

(v) If design information is not available for a process unit, then the owner or operator shall determine the process unit's basic design parameter(s) using the maximum value achieved by the process unit in the five-year period immediately preceding the planned activity.

(vi) Efficiency of a process unit is not a basic design parameter.

(3) The replacement activity shall not cause the process unit to exceed any emission limitation, or operational limitation that has the effect of constraining emissions, that applies to the process unit and that is legally enforceable.

APPENDIX D

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 42 U.S.C. 7411 provides, in pertinent part:

§ 7411. Standards of performance for new stationary sources

(a) Definitions

For purposes of this section:

* * * * *

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

* * * * *

2. 42 U.S.C. 7478 provides:

(a) Existing regulations to remain in effect

Until such time as an applicable implementation plan is in effect for any area, which plan meets the requirements of this part to prevent significant deterioration of air quality with respect to any air pollutant, applicable regulations under this chapter prior to August 7, 1977, shall remain in effect to prevent significant deterioration of air quality in any such area for any such pollutant except as otherwise provided in subsection (b) of this section.

(b) Regulations deemed amended; construction commenced after June 1, 1975

If any regulation in effect prior to August 7, 1977, to prevent significant deterioration of air quality would be inconsistent with the requirements of section 7472(a), section 7473(b) or section 7474(a) of this title, then such regulations shall be deemed amended so as to conform with such requirements. In the case of a facility on which construction was commenced (in accordance with the definition of "commenced" in section 7479(2) of this title) after June 1, 1975, and prior to August 7, 1977, the review and permitting of such facility shall be in accordance with the regulations for the prevention of significant deterioration in effect prior to August 7, 1977.

3. 42 U.S.C. 7479 provides, in pertinent part:

§ 7479. Definitions

For purposes of this part—

* * * * *

(2)(A) * * *

* * * * *

(C) The term "construction" when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.

4. 42 U.S.C. 7501(4) provides, in pertinent part:

§ 7501. Definitions

For the purpose of this part—

* * * * *

(4) The terms "modifications" and "modified" mean the same as the term "modification" as used in section 7411(a)(4) of this title.

* * * * *

5. 40 C.F.R. 52.21(b) provides, in pertinent part:

§ 52.21 Prevention of significant deterioration of air quality.

* * * * *

(b) *Definitions.* For the purposes of this section:

* * * * *

(2)(i) *Major modification* means any physical change in or change in the method of operation of a major stationary source that would result in: a significant emissions increase (as defined in paragraph (b)(40) of this section) of a regulated NSR pollutant (as defined in paragraph (b)(50) of this section); and a significant net emissions increase of that pollutant from the major stationary source.

* * * * *

(iii) A physical change or change in the method of operation shall not include:

(*a*) Routine maintenance, repair and replacement. Routine maintenance, repair and replacement shall include, but not be limited to, any activity(s) that meets the requirements of the equipment replace-

ment provisions contained in paragraph (cc) of this section;

NOTE TO PARAGRAPH (b)(2)(iii)(*a*): By court order on December 24, 2003, the second sentence of this paragraph (b)(2)(iii)(a) is stayed indefinitely. The stayed provisions will become effective immediately if the court terminates the stay. At that time, EPA will publish a document in the FEDERAL REGISTER advising the public of the termination of the stay.

(*b*) Use of an alternative fuel or raw material by reason of an order under sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plant pursuant to the Federal Power Act;

(*c*) Use of an alternative fuel by reason of an order or rule under section 125 of the Act;

(*d*) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(*e*) Use of an alternative fuel or raw material by a stationary source which:

(*1*) The source was capable of accommodating before January 6, 1975, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR subpart I or 40 CFR 51.166; or

(2) The source is approved to use under any permit issued under 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.166;

(f) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Subpart I or 40 CFR 51.166.

(g) Any change in ownership at a stationary source.

* * * * *

6. 40 C.F.R. 60.14(e) provides, in pertinent part:

§ 60.14 Modification.

* * * * *

(e) The following shall not, by themselves, be considered modifications under this part:

(1) Maintenance, repair, and replacement which the Administrator determines to be routine for a source category, subject to the provisions of paragraph (c) of this section and § 60.15.

(2) An increase in production rate of an existing facility, if that increase can be accomplished without a capital expenditure on that facility.

(3) An increase in the hours of operation.

(4) Use of an alternative fuel or raw material if, prior to the date any standard under this part becomes applicable to that source type, as provided by

§ 60.1, the existing facility was designed to accommodate that alternative use. A facility shall be considered to be designed to accommodate an alternative fuel or raw material if that use could be accomplished under the facility's construction specifications as amended prior to the change. Conversion to coal required for energy considerations, as specified in section 111(a)(8) of the Act, shall not be considered a modification.

(5) The addition or use of any system or device whose primary function is the reduction of air pollutants, except when an emission control system is removed or is replaced by a system which the Administrator determines to be less environmentally beneficial.

(6) The relocation or change in ownership of an existing facility.

(5) (3)

Nos. 06-736, 06-750

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IN THE

Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

STATE OF NEW YORK, *et al.*,

Respondents.

UTILITY AIR REGULATORY GROUP,

Petitioner,

v.

STATE OF NEW YORK, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS STATE OF NEW YORK, *ET AL.*

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COUNTER STATEMENT OF QUESTION PRESENTED

The Clean Air Act requires that "any physical change" to a "stationary source" of air pollution that increases emissions from the source undergo the "New Source Review" permitting process. The question presented is whether the Environmental Protection Agency (EPA) can exempt from this process substantial replacements of plant equipment that produce large, non-*de minimis* emissions increases.

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STATEMENT OF THE CASE

Respondents are thirteen states, the District of Columbia, various municipalities and environmental organizations that filed petitions for review of a rule (the "Rule") that EPA promulgated in 2003 under the new source review (NSR) provisions of the Clean Air Act. NSR is a permitting process that applies to a plant "modification," which includes "any physical change" that increases emissions. The Rule interprets "modification" to exclude from the NSR requirements substantial equipment replacement projects that produce large, non-*de minimis* emission increases. In a unanimous decision, the United States Court of Appeals for the District of Columbia Circuit vacated the Rule as contrary to the plain language of the statute. *State of New York v. U.S. Environmental Protection Agency*, 443 F.3d 880 (D.C. Cir. 2006).

The NSR Program

Congress enacted the 1970 amendments to the Clean Air Act "to speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the air we breathe throughout the Nation is wholesome once again." H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. 1 (1970). Because of insufficient progress toward clean air, Congress added the NSR provisions in 1977 to govern the construction and "modification" of existing major sources. 42 U.S.C. §§ 7479(2)(C) and 7501(4).[1] To obtain a permit, a

[1] NSR consists of two programs: one for areas "in attainment" with the national ambient air quality standards (NAAQS) and one for nonattainment areas. In attainment areas, a new or modified source must comply with prevention of significant deterioration (PSD) requirements designed to prevent air quality from deteriorating significantly. *See* 42 U.S.C. § 7475. In nonattainment areas, new or modified sources must comply with nonattainment NSR requirements that are designed to ensure reasonable progress toward attainment of the NAAQS. *See* 42 U.S.C. § 7503; Pet. App. 3a n.1.

source must satisfy specified air-quality-based and technology-based requirements. *See* Pet. App. 3a n.1.

A "modification" that triggers NSR requirements is defined in the statute as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." *See* 42 U.S.C. §§ 7479(2)(C) and 7501(4) (referencing definition of "modification" found in 42 U.S.C. § 7411(a)(4)). Regulations adopted in 1980 limit the scope of the modification provision to "significant" emission increases. *See* 40 CFR § 52.21(b)(2)(i) and (b)(23). In addition, the EPA's implementing regulations have always included a regulatory exemption for "routine maintenance, repair and replacement," which EPA consistently has viewed as limited to *de minimis* circumstances. *See* 70 Fed. Reg. 33,841/1 (acknowledging that, before the present rulemaking, EPA "generally had interpreted the [routine maintenance] exclusion as being limited to *de minimis* circumstances").

The Rule at Issue

In issuing the Rule, EPA abandoned its longstanding interpretation of the statutory definition of modification as encompassing the replacement of equipment.[2] The Rule

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[2] *See, e.g.*, 57 Fed. Reg. 32,316/2 (1992) (EPA "has always recognized that the definition of physical or operational change in section 111(a)(4) could, standing alone, encompass the most mundane activities at an industrial facility (even the repair or *replacement of a single leaky pipe*, or a change in the way that pipe is utilized).") (italics supplied); *In re: Tennessee Valley Authority*, 9 E.A.D. 357, 390 (Env. App. Bd. 2000) (hereafter "*In re TVA*") (EPA's Environmental Appeals Board (EAB) concluded that "TVA's replacement of various boiler components and elements clearly constituted physical changes"), *reversed on jurisdictional grounds*, *Tennessee Valley Authority v. Whitman*, 336 F. 3d 1236 (4th Cir. 2003).

expands the routine maintenance exemption to encompass activities that EPA concedes cannot be characterized as *de minimis*. 68 Fed. Reg. 61,272/3. It exempts "equipment replacement" activities that cost up to 20 percent of the entire process unit's replacement cost, as long as the new component "serve[s] the same purpose" as the replaced component, does not change the unit's "basic design parameters," and does not exceed otherwise applicable limitations on the unit's emissions.[3] 40 C.F.R. §§ 52.21(b)(56) and 52.21(cc) (2005). *See* Pet. App. 41a, 171a-175a. The Rule would allow a plant to use the exemption repeatedly, with each component replacement judged independently against the 20 percent threshold. *See* 40 C.F.R. § 52.21(cc)(1) (2005). *See* Pet. App. 172a.

Thus, for example, at a typical 1,000 megawatt power plant with a replacement cost of $800 million, the Rule would exempt the replacement of plant components that cost as much as $160 million. *See* Government Accountability Office, "New Source Review Revisions Could Affect Utility Enforcement Cases and Public Access to Emissions Data" ("GAO Report") at 18 (Joint App. 1280). EPA concedes that the Rule would exempt almost all of the emission-increasing activities at issue in several of its own enforcement cases against power plants. *See* 68 Fed. Reg. 61,258/1 (stating that "we now believe that such activities, if conducted in the future, should be excluded from major NSR").[4]

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[3] The limitation of the exemption to activities that do not result in emission increases that exceed otherwise applicable limitations does not prevent substantial emission increases because many plants are not subject to limits on annual emissions and, where such limits exist, they are often well in excess of the plant's actual emissions. *See, e.g., United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 876 (S.D. Oh. 2003) (hourly emission limits in plant's permit did not prevent substantial emission increases resulting from physical changes).

[4] The 20 percent threshold would have exempted 95 to 98 percent of the violations at issue in EPA's NSR enforcement cases (Cont'd)

The Court of Appeals' Decision

In a unanimous decision, the court of appeals vacated the Rule because it would unlawfully exempt from NSR emissions-increasing activities that fall within the plain meaning of the statutory phrase "any physical change." The court applied the test established by this Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which provides that, when "Congress has directly spoken to the precise question at issue," an agency "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. The court of appeals concluded that the plain language of the statutory definition of "modification" clearly encompasses the replacement of equipment that leads to an emission increase. Pet. App. 5a. The court began its interpretation with the statutory phrase "any physical change." Observing that EPA conceded that the "real-world, common-sense usage" of the term "physical change" includes the replacement of plant equipment, Pet. App. 6a, the court held that Congress intended the statutory definition to cover "any" such change that increases emissions. *Id.* at 7a ("Because Congress used the word 'any,' EPA must apply NSR whenever a source conducts an emission-increasing activity that fits within one of the ordinary meanings of 'physical change.'").

In its ruling, the court of appeals followed precedent established more than a quarter-century earlier when it struck down a similar EPA attempt to limit the scope of NSR. *See Alabama Power v. Costle*, 636 F.2d 323 (D.C. Cir. 1979). The court reiterated its determination in *Alabama Power* that the statutory NSR mandate "'is nowhere limited to physical changes exceeding a certain magnitude.'" *Id.* at 9a (quoting

(Cont'd)
had the Rule been in place at the time. GAO Report, *supra*, at 18-19 (Joint App. 1280-81).

Alabama Power, 636 F.2d at 400). It also noted that although one Senator proposed to limit NSR to "major expansion programs," the court determined in *Alabama Power* that "'the language of the statute clearly did not enact such limit into law.'" *Id.* (quoting *Alabama Power*, 636 F.2d at 400).

The court rejected EPA's argument that because "physical change" is capable of multiple meanings, Congress authorized EPA to exclude some physical changes from the definition, whether or not they increase emissions, and to apply NSR only to "any" of the changes it chooses not to exclude. Pet. App. 6a-7a. The court relied on this Court's prior decisions holding that "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Id.* at 7a (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). Considering the broad, inclusive meaning of the word "any," the court ruled that Congress need not spell out the types of changes that would trigger NSR requirements with a "phrase such as 'regardless of size, cost, frequency, [or] effect.'" *Id.* at 11a. In other words, said the court, there is "no reason why 'any' should not mean 'any.'" *Id.* at 8a.

The court concluded that "the scope of the definitional phrase is limited only by Congress's determination that such changes be linked to emission increases." *Id.* at 11a-12a. Therefore, the court determined that the Rule was unlawful: "Congress defined 'modification' in terms of emission increases, but the [Rule] would allow equipment replacements resulting in non-*de minimis* emission increases to avoid NSR." *Id.* at 17a.

On June 30, 2006, the court of appeals unanimously denied EPA's petition for rehearing, Pet. App. 18a-19a, and petition for rehearing *en banc*, with no judge seeking a vote. UARG Pet. App. 191a-192a.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW IS A ROUTINE APPLICATION OF ESTABLISHED PRINCIPLES OF STATUTORY CONSTRUCTION

The decision below is an unexceptional, case-specific application of the statutory interpretation principles articulated by this Court in *Chevron*. Contrary to EPA's contention, the court of appeals did not create a new exemption from those principles. Nor did it depart from this Court's precedent regarding the meaning of the word "any." Simply put, the court's interpretation of the statutory text does not break any new ground and does not merit the Court's review.

A. EPA's Claim That the Court of Appeals Created a New Rule of Statutory Construction Is Incorrect.

Recognizing the absence of any conflict among the courts of appeals, EPA tries to manufacture a question deserving of this Court's review by claiming that the court of appeals "announced a sweeping rule of construction that would operate to deprive administrative agencies of discretion to construe ambiguous statutory terms whenever those terms are preceded by the word 'any'." EPA Pet. 9. EPA is incorrect because the court of appeals' decision is nothing more than a routine application of *Chevron*. Rather than departing from the precedent of this Court, the court correctly applied *Chevron*, finding, under *Chevron*'s first step,[5] that Congress

[5] *Chevron* requires a court, applying "traditional tools of statutory construction," first to determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842, 843 n.9. If Congress has spoken, then "that is the end of the matter," and both agencies and courts must give effect to Congress's (Cont'd)

clearly intended the definition of modification to encompass equipment replacement activities that cause more than a *de minimis* increase in emissions. Pet. App. 5a-12a.

In its petition, EPA attempts to create a conflict with *Chevron* by conflating *Chevron*'s separate questions. Thus, EPA attempts to explain away this Court's prior decisions interpreting the word "any" expansively, arguing that these cases "generally involved the Court's own determination of the best meaning of the language at issue, not the clearly distinct question presented in the *Chevron* context, namely whether an agency interpretation of statutory text is reasonable." EPA Pet. at 12. But EPA is wrong because *Chevron* step one, which is what applies here, entails *judicial* determination of a statute's meaning. In this inquiry, the court, not the agency, has the last word:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

Chevron, 476 U.S. at 843 n.9 (citations omitted).[6]

(Cont'd)
intent. *Id.* at 842. If, applying traditional tools of statutory construction, a court is unable to determine Congressional intent, then, under Chevron's second step, the court must determine whether the agency's conclusion is based on a permissible construction of the statute. *Id.* at 842-43.

[6] Petitioners' contrary approach to statutory construction is itself at odds with *Chevron's* principle that courts have the primary role in (Cont'd)

EPA also mischaracterizes the decision below in claiming that the court relied solely on the word "any" in finding the "modification" definition to be unambiguous, without considering the statutory context. EPA Pet. at 9. Thus, in attempting to distinguish this Court's decision in *Department of Housing & Urban Development v. Rucker*, 535 U.S. 125, 130-31 (2002), EPA states "that the Court expressly relied on a combination of factors – not merely the word "any" alone – to support its conclusion. . . ." EPA Pet. at 12. But here too, the court of appeals relied on a combination of factors, and not solely on the meaning of the word "any." Instead, noting that "the sort of ambiguity giving rise to *Chevron* deference 'is a creature not of definitional possibilities, but of statutory context,'" *id.* at 5a-6a (internal quote from *Brown v. Gardner*, 513 U.S. 115, 118 (1994)), the court of appeals found that the context and purpose of the Act's NSR provisions establish that Congress "intended NSR to apply to any type of physical change that increases emissions." *Id.* at 8a. In particular, the court pointed to Congress's evident intent to regulate all changes that increase emissions, including the replacement of equipment:

> After using the word "any" to indicate that "physical change" covered all such activities, and was not left to agency interpretation, Congress limited the scope of "any physical change" to changes that "increase [] the amount of any air pollutant emitted by such source or which result [] in the emission of any air pollutant not previously emitted."

(Cont'd)
interpreting statutes and, if accepted, would effect a substantial transfer of policy-making authority from Congress to administrative agencies. *See* Pet. App. 11a ("Only in a Humpty Dumpty world would Congress be required to use superfluous words while an agency could ignore an expansive word that Congress did use. We decline to adopt such a world-view.").

Pet. App. 11a-12a (quoting from 42 U.S.C. § 7411(a)(4)). This one express limitation indicated to the court that Congress intended no others, and that "any" therefore encompasses *all* physical changes that increase emissions.

By construing the phrase "any physical change" in the full statutory context, instead of adopting EPA's narrow focus on the meaning of the single word "change," the court of appeals correctly concluded that Congress made its intentions clear in the statute, and thus followed this Court's decision in *Chevron*. EPA may disagree with how the court interpreted the statutory language, but that disagreement is not a basis for this Court to hear this case.

B. The Court of Appeals' Decision is Consistent With this Court's Precedent Regarding the Meaning of the Word "Any."

EPA also errs in claiming that the court of appeals' decision is contrary to this Court's precedent regarding the meaning of the word "any." EPA Pet. at 12-13. To the contrary, the court of appeals' treatment of the word "any" in the statutory definition is consistent with decisions of this Court holding that "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997); *see also Norfolk S. Rwy. Co. v. Kirby*, 543 U.S. 14, 31-32 (2004); *Rucker*, 535 U.S. at 130-31. The court of appeals appropriately relied on these precedents in determining that Congress's use of the word "any" establishes that Congress denied EPA discretion to limit the scope of the modification provisions to just some types of physical changes. *See, e.g., Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980) (in another case construing the 1977 amendments to the Act, this Court held that Congress made clear that the term "any final action" reviewable in the U.S. courts of appeals could not be limited to certain types of final actions).

See Pet. App. 7a. Accordingly, the court below adhered to this Court's precedent in holding that the phrase "any physical change" refers "indiscriminately" to any of the various physical changes, "of whatever kind," that may be undertaken at an industrial facility, as long as they increase emissions. *See Gonzales*, 520 U.S. at 5.

The cases EPA cites in support of its restrictive interpretation of the language following "any" involve statutes where contextual factors not present here supported a narrower construction. For example, in *Small v. United States*, 544 U.S. 385 (2005), a broad interpretation of "any court" to include foreign courts would have been inconsistent with traditional principles of sovereignty. *Id.* at 388-90. Likewise, the broad reading of "any sum" advocated by the taxpayer in *Flora v. United States*, 362 U.S. 145 (1960), would have abrogated the traditional principle allowing taxpayer suits for refunds only if the disputed tax had been paid. *Id.* at 157-58.[7] In contrast, the statutory context here establishes Congress's concern with the effect of increased emissions and supports the natural reading of the statute as applying to any type of physical change that increases emissions.

EPA's attempt to show that the court of appeals' decision is contrary to the Court's construction of another Clean Air Act provision in *Chevron* itself (EPA Pet. at 14) is also

[7] The Alliance of Automobile Manufacturers, *et al.*'s reliance, in their brief supporting the petition, on this Court's recent decision in *BP America Production Co. v. Burton*, No. 05-669, slip op. (U.S. Dec. 11, 2006), is likewise misplaced. In that case, this Court held that the general six-year statute of limitations for government contract actions does not apply to administrative pay orders issued by the Minerals Management Service. It held that the language of the statute of limitations clearly did not refer to administrative actions, and therefore had no occasion to defer to the agency's construction of the statutory term "any contract."

unfounded. In *Chevron*, the Court considered the definition of "stationary source," which the Act defines as including "any building, structure, facility or installation which emits or may emit any pollutant." *See id.*, 467 U.S. at 846. *Chevron* did not concern EPA's authority to construe the "stationary source" definition to exclude buildings or facilities falling within the usual scope of the statutory language. Instead, the question before the Court was whether the statutory language specified how EPA must treat a facility that consists of multiple buildings: as one source (because it is one "facility") or as multiple sources (because the facility consists of multiple "buildings"). The Court concluded that the definition of "stationary source" was not designed to answer that question, explaining that "the terms [any building, structure, facility or installation] are overlapping and the language is not precisely directed to the question of the applicability of a given term in the context of a larger operation." *Id.* at 862. Here, in contrast, Congress plainly intended for section 111(a)(4) to answer the question of what types of physical changes constitute a modification: those that increase emissions.

Therefore, the court below broke no new ground in construing the Act, and its decision is consistent with decisions of this Court interpreting the word "any." Indeed, the court's reading of "any" follows the approach repeatedly urged on this Court by the Solicitor General himself. For example, in 2003, the United States submitted an *amicus* brief in *South Florida Water Management District v. Miccosukee Tribe*, S.Ct. No. 02-626 (Sept. 2003), regarding the proper construction of 33 U.S.C. § 1362(12), which governs "any addition of any pollutant to navigable waters from any point source." In that brief, the United States contended that Congress's "use of the modifier 'any' with reference to 'addition,' 'pollutant,' and 'point source' expresses Congress's understanding that the *various types* of additions, pollutants, and point sources are all within the

Clean Water Act's regulatory reach." *Id.*, Brief of United States as *Amicus Curiae* Supporting Petitioner, 2003 WL 22137034, at 19 (italics supplied).[8] In the same way, the "various types" of physical changes are covered by the statute here, as long as they result in increased emissions. The court of appeals' straightforward application of this Court's caselaw regarding "any" does not present a question warranting this Court's review.

C. The Court of Appeals' Decision Does Not Conflict With This Court's Decisions Regarding Congressional Ratification of Regulatory Interpretations.

In an effort to circumvent the plain language of the statute, EPA claims now, for the first time, that Congress "ratified" the preexisting exclusion of some activities that might otherwise have fallen within the broad definition of "modification" under the distinct new source performance standards (NSPS) program when it enacted the NSR provisions in 1977. EPA Pet. at 16-20. In its brief in the court of appeals and in its regulatory decision, however, EPA "explicitly disclaimed" any "ratification" argument. *See* EPA Brief in *New York v. EPA* (January 10, 2006), at 19 ("EPA does not contend that . . . Congress 'ratified' [the routine maintenance] exclusion; in fact, EPA has explicitly disclaimed any such argument"); 70 Fed. Reg. 33,841/2 ("we do not believe Congress intended to ratify the then-existing interpretation"). EPA cannot now credibly claim that

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[8] *Accord*, Brief for the United States as *Amicus Curiae* Supporting Reversal *in Engine Mfrs. Assn. v. South Coast Air Quality Management District*, S. Ct. Case No. 02-1343 (Aug. 2003), 2003 WL 22068761, at 13-15 (concerning a Clean Air Act provision encompassing "any standard," the United States argued: "Congress did not define the term 'standard' for purposes of Section 209(a), but it also expressed no intent in Section 209(a) to limit that provision's preemptive effect to particular types of standards").

the court of appeals committed egregious error by eschewing an approach that the agency itself disclaimed.

To the contrary, this Court's own ratification jurisprudence demonstrates that the error lies in EPA's eleventh-hour ratification argument, not the court of appeal's decision. To show ratification, petitioners must demonstrate that Congress was aware of, and intended to incorporate, the preexisting regulatory exemptions. *SEC v. Sloan*, 436 U.S. 103, 120-21 (1978).[9] Indeed, in its petition, EPA acknowledges that mere Congressional "silence" does not constitute ratification. EPA Pet. at 16 (citing *TWA*, 432 U.S. at 76 n.11). But in this case, silence is all that EPA has; there is no evidence that Congress was even aware of the preexisting exemptions, let alone that it approved them.

Petitioners cite nothing in the language of the statute or the legislative history to support their claim that "Congress in 1977 had before it EPA's preexisting PSD rules, and Congress reviewed those rules provision-by-provision, adopting some elements and changing others," Petition of Utility Air Regulatory Group (UARG) at 16. EPA cites only the savings clause of 42 U.S.C. § 7478(a), in which Congress provided that existing regulations will remain in place until states submit their plans to implement the new statutory program. *See* EPA Pet. at 19. But this provision refutes, rather than supports, petitioners' ratification argument. Specifically, § 7478(a) states that EPA's preexisting PSD regulations were to apply only "[u]ntil such time as an applicable implementation plan is in effect for any area," and

[9] The cases that EPA relies upon are distinguishable because they involve agency interpretations that are "expressly accepted" by Congress. *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 382 (1969); *see also TWA v. Hardison*, 432 U.S. 63, 73-74 (1977) (incorporating much of the agency guidance verbatim, including concepts of "reasonable accomodat[ion]" and "undue hardship").

emphasized that the implementation plan must "*meet[] the requirements of this part* to prevent significant deterioration of air quality with respect to any air pollutant." *Id.* (emphasis added). Thus, as the court of appeals held in rejecting a similar EPA argument in *New York v. EPA* ("*New York I*"), 413 F.3d 3 (D.C. Cir.), *reh. denied*, 431 F.3d 801 (D.C. Cir. 2005), Congress adopted EPA's preexisting regulation "only *provisionally*," indicating that it saw that interpretation "not as necessarily complying with the new statute but as merely filling a gap that would have existed before its implementation." 431 F.3d at 802-03 (emphasis in original) (rejecting EPA's argument that § 129(a)(1) of the 1977 Amendments approved EPA's pre-1977 nonattainment NSR regulation).[10]

Nor can EPA persuasively argue that even if Congress did not expressly approve the pre-1977 regulatory exemptions from the NSPS definition of "modification," when Congress "elects to use statutory language that has already been given an interpretive gloss by the administering agency, it should ordinarily be presumed to intend to allow the agency to continue to employ that regulatory gloss." EPA Pet. at 16. The argument fails here, because "[w]here the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction." *Brown*, 513 U.S. at 121 (internal quotation and citation omitted); *Sloan*, 436 U.S. at 121. Thus, whatever was EPA's pre-1977 interpretation of "modification" in the NSPS regulations, that interpretation cannot justify an NSR exemption that contravenes the plain statutory language defining "modification" to include "any physical change" that increases emissions.

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[10] In *New York I*, the D.C. Circuit rejected UARG's argument that Congress incorporated the regulatory definition of modification from the NSPS program when it cross-referenced the statutory definition of modification in the NSR provisions. *Id.*, 413 F.3d at 36-39. No party petitioned for certiorari of that decision and it cannot be challenged in this case.

Finally, even if Congress had ratified the pre-1977 exclusion of routine maintenance from the definition of "modification," that would not authorize EPA to carve out the far broader exemption at issue here. 68 Fed. Reg. 61270/3 (acknowledging that the Rule expands the routine maintenance exemption).[11] While EPA "generally had interpreted the [routine maintenance] exclusion as being limited to *de minimis* circumstances," 70 Fed. Reg. 33,841/1, the Rule would allow multimillion dollar activities – in the case of power plants, activities costing over $100 million – to evade NSR review even if they increase emissions by thousands of tons a year, well in excess of any *de minimis* threshold. Therefore, the language of the pre-1977 exemption did not clearly signal to Congress that EPA intended to exempt "physical changes" producing larger-than-*de minimis* emissions increases.

As for the other three pre-1977 exemptions, *see* EPA Pet. at 16-17, they construed statutory language not at issue here, and thus could not have alerted the 1977 Congress to EPA's reading of "physical change." *See* 39 Fed. Reg. 42,514 (expressing EPA's view that an "increase in the production rate" or in "hours of operation" or the "use of an alternative fuel or raw material," "shall not be considered *a change in the method of operation*." (emphasis added)).[12] In short, petitioners fall far short of demonstrating the congressional awareness necessary to show ratification. *See Sloan*, 436 U.S. at 121.

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[11] In fact, if EPA is now correct that Congress intended to ratify the routine maintenance exemption, such ratification would, to use EPA's own words, "congeal" the routine maintenance exclusion, 70 Fed. Reg. 33841/2, thereby barring EPA from promulgating the substantially broader exclusion at issue here.

[12] Because these activities are not changes in the *method* of operation – and would not be covered by the definition of modification regardless of the resulting emission increases – it does not matter whether the resulting emission increases would not, in all cases, be *de minimis*. *See* EPA Pet. at 17.

II. THE DECISION BELOW DOES NOT HAVE THE ADVERSE CONSEQUENCES CLAIMED BY THE PETITIONERS

As explained above, the court of appeals' decision is a routine, case-specific interpretation of a statute, and therefore does not implicate any important questions of federal law. For that reason, the petitions should be denied, and petitioners' policy arguments should be disregarded. Even if those policy arguments are considered, however, they are factually incorrect.

A. The Decision of the Court Below Does Not Prevent EPA From Administering the NSR Program in a Way That Promotes Its Policy Goals.

Contrary to petitioners' suggestions, the court of appeals' decision does not place EPA in a "regulatory straitjacket," depriving it of the ability to tailor the NSR program to "changing conditions and policies." EPA Pet. at 21-22; *see also* UARG Pet. at 21. Instead, the court of appeals' decision simply recognizes that EPA lacks authority to exempt physical changes that increase emissions by non-*de minimis* amounts. EPA's authority otherwise to structure the NSR program to effectuate its policy goals is unaffected by the decision.

First, under the statutory definition of modification, as implemented by 1980 regulations not at issue here, not all physical changes trigger NSR, but only those changes that increase actual emissions by amounts exceeding specific *de minimis* thresholds. *See, e.g.*, 40 C.F.R. § 51.166(b)(23)(i); *see also Alabama Power*, 636 F.2d at 400 (EPA possesses authority to exempt from NSR "some emission increases on grounds of *de minimis* or administrative necessity"). Indeed,

under regulatory language added in 2002 and not at issue here, NSR is triggered only if the emissions increase exceeds the highest average level emitted by the source during any two-year period in the previous five years (for electric utilities) or ten years (for non-utilities). *New York I*, 413 F.3d at 22. According to EPA itself, this "lookback" provision "promotes economic growth and administrative efficiency" by "affording sources the flexibility to respond rapidly to market changes" and "focusing limited regulatory resources on changes most likely to harm the environment." *Id.* at 24.

Second, under other regulations upheld by the court of appeals, emissions increases are measured plantwide, thus allowing increases at individual components of a polluting facility to be "offset by contemporaneous *decreases* of pollutants" elsewhere in the facility. *Alabama Power*, 636 F.2d at 400 (emphasis added). "Within the terminology of the Act," changes that do not produce a net increase in any pollutant "are not 'modifications' at all." *Id.* at 401. *Alabama Power* noted that this "bubble" approach "is precisely suited to preserve air quality within a framework that allows cost-efficient, flexible planning for industrial expansion and improvement." *Id.* at 402; *see also id.* at 400 (explaining that the operating flexibility provided by the bubble approach and by EPA's *de minimis* authority "will allow for improvement of plants, technological changes, and *replacement* of depreciated capital stock.") (emphasis added).[13]

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[13] In addition, EPA's "plantwide applicability limit" provision, added in 2002 and previously upheld by the court of appeals, creates an alternative mechanism for taking advantage of a plant-wide bubble. *See* 67 Fed. Reg. 80,189/3; *New York I*, 413 F.3d at 37-38 (deferring to EPA's finding that plantwide applicability limits "encourage sources to implement physical or operational changes that improve efficiency and reduce emission rates").

Finally, EPA's contention that the decision below jeopardizes the validity of the existing routine maintenance exemption and other exclusions from the definition of modification is incorrect. EPA Pet. at 23-24. The decision does not affect the validity of the routine maintenance exemption as long as EPA continues to apply it to *de minimis* circumstances, rather than to exempt the massive multimillion-dollar projects exempted by the Rule. Likewise, existing regulations providing that fluctuations in hours of operation or production rate do not constitute changes in the method of operation are unaffected by the decision below. *See supra* at 15.

B. The Rule Vacated by the Court of Appeals Would Not Benefit the Environment.

EPA contends that the Rule would benefit the environment by increasing the efficiency of industrial operations and therefore reducing "the amount of pollution generated per product produced." EPA Pet. at 22-23. *See also* UARG Pet. at 21 (claiming that the court's decision will be "devastating" to the environment). But in enacting the NSR provisions, Congress intended to protect public health and the environment by guarding against increases in total facility emissions, not just emissions "per product produced." To the extent that an activity designed to improve efficiency will not significantly increase a facility's total emissions, that activity is already exempt from NSR. *See* 42 U.S.C. § 7411(a)(4); 40 C.F.R. § 52.21(b)(2)(i) (only changes that increase emissions significantly trigger NSR). Therefore, the sole effect of the Rule is to exempt physical changes that *do* produce significant increases. Allowing facilities to make such emissions-increasing changes without installing up-to-date air pollution controls and without ensuring that ambient

air quality is protected would degrade rather than benefit the environment.[14]

Indeed, the record of EPA's enforcement cases addressing violations of the NSR modification requirements establishes that the large-scale plant refurbishments exempted by the Rule can increase emissions substantially. For example, in an enforcement action against the Tennessee Valley Authority, EPA identified thirteen plant refurbishments that would increase emissions significantly. *See In re TVA*, 9 E.A.D. at 451-52. EPA's Environmental Appeals Board rejected TVA's claim that the projects were simply "routine maintenance," because "TVA's view of the breadth of the exception would . . . swallow the rule that subjects existing sources to the requirement to install modern pollution controls when physical changes that increase emissions are made to these plants." *Id.* at 378. Nevertheless, all but one of these expansive, emission-increasing equipment replacement projects would have been exempt under the Rule. *See* 68 Fed. Reg. 61,257/2.[15]

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[14] Projects that improve efficiency can increase emissions if the modified unit is utilized more afterwards. In that case, NSR requirements remain applicable. *See Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 297 (1st Cir. 1989) (upholding EPA's interpretation that efficiency project triggered NSR because "a firm's decision to introduce new, more efficient machinery may lead the firm to decide to *increase the level of production*, with the result that, despite the new machinery, overall emissions will increase").

[15] By way of example, the rule would exempt the $23 million equipment replacement project undertaken by TVA at Unit 1 of its coal-fired Cumberland Plant. Schoengold Dec., Att. K (Joint App. 1322) (2.4% of unit's replacement cost). That project, which required a three-month shutdown of the unit, resulted in an emissions increase of 21,187 tons of nitrogen oxides per year, *In re TVA*, 9 E.A.D. at 443, 491 – more than the total annual NOx emissions from all sources in the District of Columbia. *See* www.emissionsonline.org/nei99v3/state/stindex.htm.

C. The Utility Industry's Equitable Arguments Are Legally Irrelevant and Factually Incorrect.

Finally, the Court should reject UARG's reliance on the briefs submitted to this Court in *Environmental Defense v. Duke Energy Corp.*, No. 05-848, to support UARG's claim that the court of appeals' decision will expand the application of NSR requirements and thwart industry reliance on its prior understanding of those requirements. UARG's arguments are irrelevant to this proceeding, which addresses only the definition of "physical change," and does not attempt to define how emissions increases are to be calculated. *See* Pet. App. at 15a (industry's maximum emissions argument "is irrelevant because it does not address what constitutes a 'physical change'").

In any event, UARG's claim of ignorance cannot be supported. As the United States explained in *Duke Energy*, UARG's claim that the utility industry has always understood EPA's emissions increase test under NSR to be identical to the agency's NSPS emissions test is false.[16] Furthermore, the record of the present rulemaking, and of EPA's enforcement cases, establishes that industry understood that replacement of plant equipment in order to extend a plant's life would trigger NSR requirements.[17] *See United States v. S. Ind. Gas*

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[16] Responding to a similar contention made by Duke Energy, the United States pointed out that the utility industry industryhas long understood that EPA's regulatory test for NSR emissions increases – turning on actual emissions – does not restrict NSR coverage to cases in which there is an increase in "capacity" measured by hourly emission rates. *See, e.g.*, United States Reply Br. in No. 05-848 at 14 & n.11 (citing UARG documents); Brief for the United States in No. 05-848 at 32-33 (discussing 1982 settlement agreement requiring EPA to consider substituting an hourly rate test for the actual annual test EPA had adopted in 1980).

[17] For example, the administrative record includes a 1989 power company memorandum reporting on advice provided by UARG that

(Cont'd)

and Electric Co., 245 F.Supp. 2d 994, 1018-19 (S.D. Ind. 2003) (noting that defendant utility received notice of the narrow scope of the routine maintenance exemption from, among other things, a 1989 UARG memorandum stating that "'routine' activities include only those that (1) are frequently done at that plant, (2) involve no major equipment, (3) are inexpensive, and (4) do not extend the life of a plant"); *Ohio Edison*, 276 F.Supp. 2d at 888 (finding that language of statute, regulations and preambles made it "ascertainably certain that only *de minimis* activities would serve to trigger the routine maintenance exemption").

(Cont'd)
states: "UARG believes that under the present EPA policy, in order to qualify for the routine maintenance exemption, the activity would have to be: frequent; inexpensive; able to be accomplished at a scheduled outage; will not extend the normal economic life of the unit; [and] be of standard industry design." *See* Comments of New York Attorney General Eliot Spitzer, *et al.*, on Proposed Amendments to Prevention of Significant Deterioration and Non-attainment New Source Review Requirements, Docket No. A-2002-04 (May 2, 2003), Ex. 14, pg. 4 (Joint App. 1077).

CONCLUSION

The petitions for writ of certiorari should be denied.

Dated: January 26, 2007

Respectfully submitted,

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IN THE

Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

STATE OF NEW YORK, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AND CLEAN AIR IMPLEMENTATION PROJECT RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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DISCLOSURE STATEMENT

The Alliance of Automobile Manufacturers ("the Alliance") is a non-profit, unincorporated organization of individual automobile manufacturers operating facilities in the United States. The Alliance has no outstanding shares or debt securities in the hands of the public and does not have any parent, subsidiary or affiliate that has issued shares or debt securities to the public.

The Clean Air Implementation Project ("CAIP") is a non-profit trade association whose member companies represent a broad cross-section of American industry. CAIP has no outstanding shares or debt securities in the hands of the public and does not have any parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

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RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 12.6, the Alliance of Automobile Manufacturers ("the Alliance") and the Clean Air Implementation Project ("CAIP"), intervenors below, respectfully submit this response in support of the petitions for a writ of certiorari of the United States Environmental Protection Agency ("EPA") and the Utility Air Regulatory Group ("UARG") in *EPA v. State of New York*, No. 06-736, and *UARG v. State of New York*, No. 06-750, in which EPA and UARG seek review of the decision of the United States Court of Appeals for the District of Columbia Circuit in *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006) ("*New York II*").[1] This response is being submitted within 20 days of EPA's petition having been docketed on November 27, 2006 and UARG's petition having been docketed on November 29, 2006.

REASONS FOR SUPPORTING EPA's AND UARG's PETITIONS

Both EPA and UARG have filed petitions for a writ of certiorari seeking review of *New York II*. *See EPA v. State of New York*, No. 06-736 (U.S. filed Nov. 27, 2006) and *UARG v. State of New York*, No. 06-750 (U.S. filed Nov. 27, 2006).

The Alliance and CAIP were intervenors in *New York II*[2] and support both of these petitions for the reasons stated

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[1] EPA's petition seeks review of the second of two decisions rendered by the D.C. Circuit, both of which involved challenges to legislative rules promulgated by EPA and were styled *New York v. EPA*.

[2] Counsel has been authorized to state that this brief also represents the views of the American Chemistry Council, American Petroleum Institute, American Forest & Paper Association, National Petrochemical & Refiners Association, Corn Refiners Association, and the Portland

therein as well as due to the pervasive and negative effect that the ruling of the D.C. Circuit will have and is having on U.S. industry generally.

The Alliance and CAIP are concerned with the far-reaching implications of the Court of Appeals decision, which effectively would invalidate EPA's long-standing implementation of the modification element of the NSR program. Members of the Alliance and CAIP have extensive experience in the design, construction, and operation of industrial facilities and with the types of activities necessary for the safe, efficient and reliable operation of those facilities, as well as the historical application of the NSR program.

The petitions should be granted because the D.C. Circuit opinion, in failing to give deference to EPA's long-standing interpretation of the Clean Air Act and substituting its own analysis which conflicts with this Court's recent teaching on how similar language should be interpreted, threatens to play havoc with the normal, efficient operation of American industry. The D.C. Circuit's view could transform NSR from what is primarily an expensive, one time *new* source program - currently involving about 200 applications each year – into a program under which most of America's 22,000 existing major industrial plants repeatedly could trigger NSR analyses. Existing industrial facilities must undertake thousands of repair and replacement projects every year. If those activities allow the facility to operate more than in the recent past, the D.C. Circuit would conclude that they are "any physical changes" that could trigger NSR.

Cement Association, which participated in the proceedings below as members of the Equipment Replacement Rule Coalition, an intervenor in the proceedings.

This holding is contrary to how EPA has implemented its NSR program and how industrial plants operate on a daily basis. Industrial facilities are comprised of multiple pieces of equipment that work together in a variety of ways to produce usable goods, like cars. When investment is made in an industrial plant, it is anticipated that further investment and work will be required for it to serve the intended purposes of bringing particular goods to market.

As equipment is used, it is subject to wear and tear, just like a car or a house. As with cars and houses, it is expected that certain activities must occur to keep the plant operating safely, reliably and efficiently, while maintaining its existing, permitted capacity. It is just this type of activity that the D.C. Circuit decision could sweep into the concept of "change" with its newly-announced rule of statutory construction.

An example of the type of maintenance that the D.C. Circuit's opinion would classify as a "change" is the replacement of components of gas turbines used in industrial plants for power generation or natural gas pipelines. During the turbine's life, components like stator blades, turbine nozzles, buckets, fuel nozzles, seals, and packings are expected to be replaced. The D.C. Circuit's opinion would require an emissions *de minimis* analysis for each of these activities for them to be excluded as routine replacement even though EPA has recognized in issuing the New Source Performance Standards ("NSPS") for gas turbines that such activities are *not* changes that could trigger modification requirements.[3] Based on the D.C. Circuit's new rule of statutory construction, arguably all of these activities would

[3] *See* EPA-450/2-77-017a, Standards Support and Environmental Impact Statement Volume 1: Proposed Standards of Performance for Stationary Gas Turbines, 5-6 (Sept. 1977) *available at* http://nepis.epa.gov/pubtitle.htm (last updated Dec. 11, 2006).

be considered "any" changes that must be evaluated for purposes of NSR, notwithstanding EPA's prior determination (in 1977) that such activities are not changes. EPA has reached similar conclusions regarding major component replacements at other industrial facilities, including refineries.[4] Yet, the D.C. Circuit would effectively undo these determinations, of which Congress was clearly aware when it amended the Clean Air Act. *See Hall v. EPA*, 273 F.3d 1146, 1158 (9th Cir. 2001) (citing *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)).

As another example, the replacement of worn out bearings with new, improved versions may reduce the frequency of breakdowns in heavy equipment and corresponding unscheduled maintenance/repair. This, in turn, would enable a company to lengthen the periods between scheduled maintenance outages. Improved bearings do not change the capability of the equipment — *actual hourly emissions capability remains the same*. But they allow the process to operate more reliably (*i.e.*, with fewer equipment breakdowns) such that annual emissions could increase

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[4] *See, e.g.*, Letter From Kenneth Eng, USEPA to Dale Choate, Mobil Oil Corporation (9/7/88) ("[T]he replacement of the regenerator cyclone does constitute routine maintenance."); Mem. from Reich, USEPA to Region VI Enforcement Division Director (10/3/78) *available at* http://www.epa.gov/Region7/programs/artd/air/nsr/nsrmemos/m100378.pdf (last visited Dec. 15, 2006). ("Routine replacement means the routine replacement of parts, within the limitations of reconstruction."); *see also* EPA-450/2-78-006a, Electric Utility Steam Generating Background Information for Proposed Particulate Emission Standards, 5-4 (July 1978) *available at* http://nepis.epa.gov/pubtitle.htm (last updated Dec. 11, 2006), (Replacement of coal pulverizer does not trigger modification rule.); EPA-450/3-85-025a, Calciners and Dryers in Mineral Industries: Background Information for Proposed Standards, 5-2 (Oct. 1985) *available at* http://nepis.epa.gov/pubtitle.htm (last updated Dec. 11, 2006); (Examples of RMRR include the "replacement or refurbishing of components subject to high abrasion and impact.").

because the equipment can operate for longer periods between maintenance. If the equipment breaks down less often, it may be able to operate a few more hours, days or even a week a year depending on the equipment.

In the foregoing example, production would increase by increasing hours of operation, but without increasing the hourly emission rate or the actual hourly emissions capacity of a unit. On large equipment, emissions increases on an annual basis may well exceed a *de minimis* threshold and yet the D.C. Circuit opinion would consider such replacements to be "any" changes – after all the bearings are being *changed* – subjecting the project to a detailed analysis of whether such replacement is a modification of the equipment that could trigger NSR.

NSR is reserved for brand new facilities and existing facilities that undertake "physical *changes*" or "*changes* in the method of operation" that increase emissions. 42 U.S.C. §§ 7411(a)(4), 7501(4). In promulgating the rule at issue here, EPA answered a key question: What is a change? Implicit in this question is that there is a starting point against which to evaluate an activity. For without a starting point, it is impossible to know if a change will occur.

In the context of manufacturing plants, the relevant starting point can only be the existing plant as designed to operate over its lifetime. Plants are in a constant state of flux in response to market demand, changing consumer tastes for their goods, and wear and tear on production equipment. They are designed to operate in a flexible manner. The D.C. Circuit's opinion ignores this fact and puts manufacturing industry in a straightjacket of the most recent operations, ignoring the investment made in equipment and emissions controls when the plant was built. Such an approach is wholly arbitrary and unrelated to the goals of the NSR program to balance economic growth with environmental

reductions from new emitting capacity.[5] 42 U.S.C. § 7401(b)(1).

That Congress could not intend the broad construction the D.C. Circuit ascribes to the modification definition is also clear based on its practical consequences. If an activity triggers NSR permitting, the facility must apply for a permit and retrofit new source control technologies *before* implementing the activity. It may also need to conduct air quality modeling and purchase emission credits from another plant. The permitting process can take a year or more. If the activity is a necessary repair or replacement project, the result could be an extended shutdown of the facility until the project could be undertaken. Such an approach would represent a fundamental, drastic change in how industry operates, and would frustrate Congress' purposes of encouraging (not halting) economic growth.

Beginning in 1971, EPA issued regulations and guidance clarifying that a "change" does not include activities consistent with facility design.[6] Thus, "routine maintenance,

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[5] The purposes of PSD include balancing environmental progress and economic growth. 42 U.S.C. § 7470(3); *see also Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 866 (1984) ("We hold that the EPA's definition of the term 'source' is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth.").

[6] From the beginning of the NSPS program, EPA explained that, "in keeping with the intent of section 111 of controlling facilities only when they constitute a new source of emissions," the modification regulations were "limited to increases in actual emissions," which EPA defined in terms of "increased production capacity" (*not* increased hours of operation). 39 Fed. Reg. 36,945, 36,946-47 (Oct. 15, 1974); *see also* 36 Fed. Reg. 24,875, 24,876 (Dec. 23, 1971) ("Increases in production rates up to design capacity will not be considered a modification."); 39 Fed. Reg. at 36,947 (The modification rule is "sensitive to increased production capacity and ... automatically allow[s] increases in operating hours.").

repair, and replacement," "increase in the production rate, if such increase does not exceed the operating design capacity of the affected facility," "increase in the hours of operation," and "use of an alternative fuel or raw material if ... the affected facility is designed to accommodate such alternative use" are not "changes." 40 C.F.R. § 60.2(h); 36 Fed. Reg. at 24,877. The common denominator among these provisions is they reflect the contemplated normal operation consistent with how that unit was designed, constructed and permitted to operate.

Many of these activities increase emissions. For example, moving from one fuel to another would arguably constitute "any change" under the D.C. Circuit's construction and would clearly have the possibility of increasing emissions by more than a *de minimis* amount, *e.g.*, if a plant moves from gas to oil. Yet, all of these exclusions were in place when Congress amended the Clean Air Act, and Congress must be presumed to have known this fact. The D.C. Circuit opinion simply fails to explain how its view of the statute can be squared with these long-standing, congressionally-endorsed exclusions.[7]

Finally, the D.C. Circuit opinion is also contrary to this Court's recent opinion in *BP America Production Co. v. Burton*, No. 05-669, slip op. (U.S. Dec. 11, 2006), which stated:

> Petitioners contend that their broader interpretation of the statutory term "action" is supported by the reference to "*every* action for money damages" founded upon "*any* contract." 28 U.S.C. § 2415(a) (emphasis added). But the broad terms "every" and

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[7] *See* EPA Pet. at 16 (citing *TWA v. Hardison*, 432 U.S. 63, 76 n.11 (1977); *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 983 (1986)).

> "any" do not assist petitioners, as they do not broaden the ordinary meaning of the key term "action."

Id. at 7. This Court found that although the term "action" sometimes includes administrative actions, its ordinary usage is limited to judicial proceedings. In contrast, the D.C. Circuit held in this case that "when Congress places the word 'any' before a phrase with several common meanings, the statutory phrase encompasses each of those meanings" and the agency cannot pick among them, *i.e.*, cannot pick a narrow one over a broad one. *New York II*, 443 F.3d at 888. In *BP America*, this Court found the opposite, in fact, that notwithstanding the use of the word "any," the statute at issue *compelled* a more limited definition of the word action consistent with the statutory context, structure and purpose. Contrary to this Court's holding in *BP America*, the D.C. Circuit holds that the term "any" does in fact broaden the meaning of the word "change" and take it out of context from the normal manufacturing operations of a plant.

The Alliance and CAIP, therefore, agree with EPA and UARG that granting certiorari in this case is important to the proper administration of the Clean Air Act and the continued efficient and reliable operation of industry. Not only does the D.C. Circuit's erroneous new approach to statutory construction in *New York II* threaten "to put EPA into a regulatory straightjacket that Congress did not intend, with few if any options to tailor the program to changing conditions and policies," EPA Pet. at 21, it also threatens to hamstring American industry and prevent it from maintaining and repairing existing facilities. The "environmental benefits" the D.C. Circuit opinion would legislate are clearly outweighed by the risks of poorly operating facilities and the environmental costs of equipment that is not maintained and replaced as needed.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Clean Air Implementation Project

December 18, 2006

APPENDIX

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region II
26 Federal Plaza
New York, New York 10278

Sep 7, 1988

Mobil Oil Corporation
Paulsboro Refinery
Paulsboro, New Jersey 08066

Attention: Mr. Dale E. Choate, Refinery Manager

Dear Mr. Choate:

This memorandum is written in response to your request dated February 26, 1988 concerning EPA's concurrence on the scheduled replacement of the regenerator cyclones in the Fluid Catalytic Cracking Unit (FCC), at the Paulsboro refinery. Additional information concerning this project was submitted to Mr. William J. O'Sullivan, Assistant Director of the New Jersey Department of Environmental Protection ("NJDEP"), on May 23, 1988.

EPA, Region II, has reviewed this information, together with the information provided in your February 26, 1988 submittal and has determined that the replacement of the regenerator cyclones does constitute routine maintenance. During this turnaround, repairs and replacement of FCC components at the Paulsboro refinery, are not considered modifications under §60.14(e)(1), therefore, this unit is not subject to New Source Performance Standards ("NSPS") for sulfur oxides ("SO_x").

If you have any further questions, please contact Jose A. Rodriguez at (212)-264-6686.

Sincerely,

/s/

Kenneth Eng, Chief
Air Compliance Branch

cc: W. O'Sullivan, Assistant Director
New Jersey Department of
Environmental Protection

ENVIRONMENTAL PROTECTION AGENCY

OCT 3, 1978

MEMORANDUM

Subject: PSD - Routine Maintenance Repair and Replacement

From: Director
Division of Stationary Source Enforcement

To: Howard G. Bergman, Director
Enforcement Division (6AE)
Region VI

This is in response to your memo of September 15, 1978, requesting an interpretation of the term "routine maintenance, repair and replacement" as it is used in §52.21(b)(2)(i). In particular you request guidance on what should be considered routine replacement. Routine replacement means the routine replacement of parts, within the limitations of reconstruction, and would not include the replacement of an entire facility (i.e., an old heater at a petrochemical plant which has ended its normal useful life.

If you have any further questions, please contact Libby Scopino at FTS 755-2564.

/s/

Edward E. Reich

cc: Mike Trutna
Peter Wyckoff

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No. 06-736

IN THE

Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

STATE OF NEW YORK, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONSE OF THE NATIONAL ENVIRONMENTAL DEVELOPMENT ASSOCIATION'S CLEAN AIR PROJECT IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The National Environmental Development Association's Clean Air Project ("NEDA/CAP") was an intervenor in support of the United States Environmental Protection Agency ("EPA") in the D.C. Circuit below, and is a respondent in this case. EPA's petition lists all the parties to the proceeding. *See* Pet. ii-iii. NEDA/CAP is a non-profit association of manufacturers that has no parent corporations and has issued no stock.

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IN THE

Supreme Court of the United States

No. 06-736

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
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RESPONSE OF THE NATIONAL ENVIRONMENTAL DEVELOPMENT ASSOCIATION'S CLEAN AIR PROJECT IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to S. Ct. Rule 12.6, respondent National Environmental Development Association's Clean Air Project ("NEDA/CAP") respectfully submits this response in support of the petition for certiorari filed by the Environmental Protection Agency ("EPA") seeking review of the judgment of the United States Court of Appeals for the D.C. Circuit below. The D.C. Circuit invalidated an important regulatory initiative under the Clean Air Act ("CAA")—EPA's Equipment Replacement Provision ("ERP") rule—that sought to

bring much needed certainty and consistency to a complex administrative scheme. The court's decision adversely affects thousands of regulated entitles nationwide, and has deleterious consequences for regulators and the environment as well. The Solicitor General has deemed this matter important enough to merit this Court's review. The petition should be granted.

1. NEDA/CAP intervened in support of EPA in the D.C. Circuit below. NEDA/CAP's members are manufacturers representing major industrial sectors, including the aerospace, aluminum, automobile manufacturing, natural resource exploration, refining and petrochemicals, pharmaceuticals, electronics, and home products industries. NEDA/CAP's members own and operate "major emitting facilities" and "major stationary sources" under the CAA, and thus are subject to the Act's New Source Review ("NSR") permitting requirements when they undertake an activity at their plants that constitutes a "modification"—defined in the Act as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4).

Manufacturers typically use multiple process lines—consisting of dozens or even hundreds of pieces of equipment—to make various products during different periods of the year depending on economic demand and other factors. Over the life of a piece of a equipment, manufacturers undertake numerous routine maintenance, repair, and replacement activities to ensure the safety, reliability, and efficiency of the equipment. Such activities typically do not alter the equipment's original design or production capacity, but merely allow the equipment to function as it had before it began to deteriorate. In other words, such activities do not physically "change" a piece of equipment in any fundamental

way, but merely "maintain[] the [equipment] as designed." Pet. App. 46a.

2. EPA has long recognized that "Congress specifically decided that existing sources generally would not be required to obtain [NSR] permits," *id.* at 117a, and that therefore "Congress did not intend that every activity at an existing facility be considered a physical or operational change for purposes of NSR." *Id.* at 131a (quotation omitted). Thus, since the inception of the NSR program, EPA has excluded from the definition of "physical change" activities that constitute "routine maintenance, repair, and replacement" ("RMRR"). *See id.* at 119a-121a. Prior to the ERP rule, EPA had never sought to specify what types of activities constituted RMRR. Instead, EPA applied the RMRR exclusion on "a case-by-case basis," using an indeterminate "multi-factor test" that involved "weighing the nature, extent, purpose, frequency, and cost of the work as well as other factors." *Id.* at 4a, 31a (quotation omitted). In one applicability determination, EPA considered 14 different factors in determining whether a proposed activity constituted RMRR. *See* Detroit Edison Applicability Determination Detailed Analysis 10-11 (May 23, 2000); 65 Fed. Reg. 77623 (Dec. 12, 2000).

Over time, EPA came to acknowledge that the RMRR exclusion has been difficult to apply and that it has produced undesirable results. As EPA has explained, the application of the exclusion on a "case-by-case basis" has made it "difficult for the owner or operator to know with reasonable certainty whether a particular activity constitutes RMRR." Pet. App. 32a. That uncertainty has led sources "to forego needed and beneficial maintenance, repair, and replacement activities, including ones that would likely have reduced emissions." *Id.* at 34a. It has also posed problems for regulators, who must "devote scarce resources to make complex [RMRR] determinations. *Id.*

To remedy these and other problems, EPA adopted the ERP rule—a bright line rule that automatically excludes certain RMRR activities from the definition of "physical change." Under the ERP rule, an activity falls within the RMRR exclusion if it (1) involves replacement of any existing components of a unit with components that are identical or serve the same purpose as the replaced components; (2) the fixed capital cost of the replaced component, plus costs of any activities that are part of the replacement activity, does not exceed 20 percent of the current replacement value of the unit; and (3) the replacement does not alter the basic design parameters of the unit or cause the unit to exceed any legally enforceable emissions or operational limitation that applies to any component of the unit. *Id.* at 41a.

EPA explained that the ERP rule would provide certainty to regulated entities, ease administrative burdens by freeing regulators from the task of "time-consuming RMRR determinations," and remove disincentives to RMRR activities, "thereby enhancing key operational elements such as efficiency, safety, reliability, and environmental performance." *Id.* at 36a. EPA further noted that, "[i]n many cases, we believe that maintaining safe, reliable, and efficient operations will have the corresponding environmental benefit of reducing the amount of pollution generated per product produced." *Id.* at 44a. Thus, EPA emphasized, the ERP rule "[is] consistent with the central purpose of the CAA"—" 'to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population.' " *Id.* (quoting 42 U.S.C. § 7401(b)(1).

4. The D.C. Circuit invalidated that important regulatory initiative. Although the court acknowledged that the term "physical change" is "susceptible to multiple meanings," *id.* at 17a, the court nevertheless concluded that Congress's use of the term "any" before "physical change" mandated that the

term "physical change" be given its most "expansive meaning." *Id.* at 12a. The court thus held that "physical change" encompasses all "activities within each of the common meanings of the [term] * * * when the activity results in an emission increase." *Id.* at 17a. EPA, therefore, was not free to "pick and choose among them." *Id.* at 12a. The court also held that the ERP rule was invalid because it "would allow equipment replacements resulting in non-*de minimis* emissions increases." *Id.* at 17a.

5. This Court's review of the D.C. Circuit's decision is warranted. The question presented is important and affects thousands of regulated entities across the country in all major industrial sectors. The ERP rule provides regulated entities with certainty that certain types of repair and replacement activities—those involving the repair or replacement of components with identical or functionally equivalent components that do not alter the basic design parameters of a unit and that do not exceed 20 percent of the current replacement value of the unit—fall within the RMRR exclusion. That certainty will encourage entities to undertake critical repair and replacement activities that promote the safety, reliability, and efficiency of their equipment, and that may have the "corresponding environmental benefit" of reducing emissions from a source. *Id.* at 44a.

As EPA noted, the uncertainty attending the existing RMRR exclusion has led sources "to forego needed and beneficial maintenance, repair, and replacement activities, including ones that would likely have reduced emissions," *id.* at 34a, rather than run the risk of triggering NSR review. That is not only because NSR review is burdensome and expensive, but also because it is extremely time-consuming and results in significant delays. As EPA recently reported, the entire NSR permitting process can take between 7 and 22 months. *See* EPA, *New Source Review: Report to the President* 20 (2002). If NSR review is triggered, a source may not undertake the proposed activity until a permit has

been issued. *See* 40 C.F.R. § 51.166(a)(7)(iii). Dozens if not hundreds of repair and replacement activities that merely "maintain[] the [equipment] as designed," Pet. App. 46a, could occur on a single process line over the course of a year. If all such activities were subject to NSR review, manufacturing in this country would virtually grind to a halt. *See id.* at 33a (noting that NSR delays present "a potentially significant barrier to today's global, quick-to-market industries, such as computer chips, pharmaceuticals, and autos").

The D.C. Circuit's invalidation of the ERP rule has adverse consequences for regulated entities, federal and state regulators, and the environment. Moreover, as the Solicitor General explains (Pet. 23), the court's ruling may limit EPA's ability to remedy the problems associated with the existing RMRR exclusion and may even cast doubt on that exclusion itself—even though EPA has "historically construed" the exclusion to "encompass[] activities that are within the broadest meaning of 'physical change' " *id.* at 23, and has "never construed" the exclusion "to encompass only de minimis emissions increases," *id.* at 17-18—as well as several other exclusions that have been in existence for nearly thirty years. *See id.* at 10, 24. There is accordingly no basis for the Court to wait until another day to resolve this important issue. The Court should thus grant review and ensure that NSR review is limited to "new" sources, just as Congress intended.

CONCLUSION

For the foregoing reasons, and those in EPA's petition for certiorari, the petition should be granted and the D.C. Circuit's judgment reversed.

Respectfully submitted,

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No. 06-736

IN THE

Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

STATE OF NEW YORK, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

THE UTILITY AIR REGULATORY GROUP'S RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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DISCLOSURE STATEMENT

The Utility Air Regulatory Group ("UARG") is a non-profit, unincorporated organization of individual electric utilities and national trade associations. UARG has no outstanding shares or debt securities in the hands of the public and does not have any parent, subsidiary or affiliate that has issued shares or debt securities to the public.

RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 12.6, the Utility Air Regulatory Group ("UARG"), an intervenor-respondent below, respectfully submits this response in support of the petition for a writ of certiorari of the United States Environmental Protection Agency ("EPA") in *EPA v. State of New York*, No. 06-736. EPA seeks review of the decision of the United States Court of Appeals for the District of Columbia Circuit in *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006) ("*New York II*"). This response is being submitted within 20 days of EPA's petition having been docketed on November 27, 2006.

REASONS FOR SUPPORTING EPA'S PETITION

On November 27, 2006, UARG filed a petition for a writ of certiorari seeking review of *New York II* on much the same terms as EPA. *See UARG v. State of New York*, No. 06-750 (docketed November 29, 2006). In its petition, EPA questions whether the D.C. Circuit "erred in invalidating" the Equipment Replacement Provision ("ERP") rule on the "ground that the phrase 'any physical change' in the definition of 'modification' in" Clean Air Act ("CAA") § 111(a)(4) "unambiguously requires EPA to adopt the broadest meaning of the phrase." EPA Petition at (I). For its part, UARG questions whether the court's "reliance on a fragment of the 40-word statutory definition of 'modification' to find a clear expression of congressional intent" conflicts with this Court's *Chevron* decision. UARG Petition at i.

In support of certiorari on this issue, EPA observes that, in striking down the ERP rule, the D.C. Circuit has "announced a sweeping rule of construction" that would "operate to deprive administrative agencies of discretion to construe ambiguous statutory terms whenever those terms are preceded by the word 'any'." EPA Petition at 9. This holding, EPA points out, "is inconsistent" with this Court's "repeated admonitions

that statutes must be construed in context and as a whole," as well as with this Court's decision in *Chevron*. *Id.* at 9-10. As EPA notes, *Chevron* "involved the same statute and the same definitional section at issue here." *Id.* at 14.[1]

UARG agrees, noting in its petition that under the "new formulation of *Chevron*" presented in *New York II*, "specific meaning is given to fragments of statutory language in order to find an unambiguous congressional 'intent'" that could not be found if "traditional canons of statutory construction were applied to the statutory provision as a whole." UARG Petition at 3. Excising three words – *i.e.*, "any physical change" – from the statutory definition, UARG continues, runs afoul of the well-settled principle that a reviewing court "should not confine itself to examining a particular statutory provision in isolation." *Id.* at 14-15, *quoting FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). For these reasons, UARG supports granting EPA's petition, to address the conflict between *New York II* and this Court's decision in *Chevron*.

UARG's petition also presents a second question: whether EPA "has discretion under the CAA to adopt a rule that excludes" from . . . NSR a "subset of projects" that are not "modifications" under the New Source Performance Standards ("NSPS") program, as that term "modification" has been "defined and used under the CAA for the past 35 years." UARG Petition at i EPA's petition encompasses and provides compelling support for granting certiorari to address this issue as well.

First, EPA points out that *New York II* conflicts with the established presumption that "Congress . . . legislate[s] with awareness of prior administrative regulations," and that when

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[1] *See also* UARG Petition at 20 (noting this Court's explanation of "modification" and "major modification" as distinct concepts: under the New Source Review ("NSR") rules, a source "may . . . modify one piece of equipment without meeting [NSR] . . . if the alteration will not increase total emissions from the plant," *i.e.*, if it is not a "major modification.").

Congress "elects to use statutory language that has already been given an interpretive gloss by the administering agency," it should "ordinarily be presumed to intend to allow the agency to continue to employ that regulatory gloss." EPA Petition at 16, *citing TWA v. Hardison*, 432 U.S. 63, 76 n.11 (1977); *Young v. Community Nutrition Inst.*, 476 U.S. 974, 983 (1986). This "inference of congressional approval is fully applicable here," EPA continues, given that, when "Congress enacted the statutory NSR program in 1977," and "cross-referenc[ed] the pre-existing NSPS statutory definition of 'modification,'" Congress "acted in a context in which EPA had already interpreted that key provision." *Id.* EPA faults the D.C. Circuit for "disregard[ing] the fact" that Congress had accepted this "prior [NSPS] regulatory construction[]" of the term "modification." *Id.* at 19. Indeed, as UARG observes, it would be a "particularly odd approach to statutory interpretation to conclude that, by defining 'modification' for NSR to mean 'modification' as defined in NSPS," Congress "intended to *preclude* EPA from implementing CAA § 111(a)(4) for NSR the same way it had always implemented that provision for NSPS." UARG Petition at 17 (emphasis in original).

Moreover, as EPA explained in its petition, "[t]he regulations that EPA promulgated in 1974 to implement the original regulatory" Prevention of Significant Deterioration ("PSD") program "defined 'modification' [in 40 C.F.R. § 52.01(d)] in largely the same way as it was defined for the existing NSPS." EPA Petition at 4; *see also* UARG Petition at 6-8. Both EPA and UARG point out that, in the 1977 CAA Amendments, Congress specifically provided that the definition of "modification" established under the 1974 PSD program would "continue[] to govern the application of new statutory NSR programs without the need for further rulemaking." UARG Petition at 9, *citing* CAA § 168(a); EPA Petition at 19 ("Congress specifically demonstrated [in CAA § 168(a)] its awareness and approval of the prior regulations . . . by mandating that most of the pre-existing regulations 'shall remain in effect' until implementation plans" were adopted.). UARG agrees

with EPA that, "at the very least," this establishes that excluding from NSR projects that are not NSPS modifications is "'a defensible construction' of the Act." EPA Petition at 19.

Finally, UARG agrees with EPA that granting certiorari in this case is important to the proper administration of one of the most important regulatory programs in this country. As EPA explains, the D.C. Circuit's bold (and erroneous) new approach to statutory construction in *New York II* "threatens to put EPA into a regulatory straightjacket that Congress did not intend," with "few if any options to tailor the program to changing conditions and policies" in order to "achieve environmental benefits." EPA Petition at 21. If not reversed, EPA continues, *New York II* will impede its "ability to address those problems in the future." *Id.* at 23; *see also* UARG Petition at 19. That both the regulator and the regulated community agree as to the importance of the case underscores the need for this Court to exercise its supervisory power.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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December 18, 2006

No. 06-736

In The Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

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v.

STATE OF NEW YORK, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF VIRGINIA, ALABAMA, ALASKA, ARKANSAS, KANSAS, MISSOURI, NEBRASKA, NORTH DAKOTA, SOUTH DAKOTA, UTAH, AND WYOMING AS RESPONDENTS IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Whether the court of appeals erred in invalidating an EPA rule on the ground that the phrase "any physical change" in the definition of "modification" in Section 111(a)(4) of the Clean Air Act, 42 U.S.C. § 7411(a)(4), unambiguously requires EPA to adopt the broadest meaning of the phrase?

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BRIEF OF VIRGINIA, ALABAMA, ALASKA, ARKANSAS, KANSAS, MISSOURI, NEBRASKA, NORTH DAKOTA, SOUTH DAKOTA, UTAH, AND WYOMING AS RESPONDENTS IN SUPPORT OF THE PETITION

Virginia, Alabama, Alaska, Arkansas, Kansas, Missouri, Nebraska, North Dakota, South Dakota, Utah, and Wyoming (collectively "Intervening States") were parties in the court of appeals and, thus, technically are Respondents in this Court. *See* Sup. Ct. R. 12.6 ("All parties other than the petitioner are considered respondents. . . . "). The Intervening States entered this litigation to support the United States Environmental Protection Agency ("EPA") and they continue to believe EPA's position is correct. Therefore, the Intervening States ask this Court to grant the Petition for the reasons stated in EPA's Petition for Certiorari. *See* Sup. Ct. R. 12.6 ("a response supporting the petition shall be filed within 20 days after the case is placed on the docket").

In the event this Court grants certiorari, the Intervening States will file a Brief on the Merits as Respondents supporting the Petitioner. *See* Sup. Ct. R. 25.1 ("Any respondent . . . who supports the petitioner . . . shall meet the petitioner's . . . time schedule for filing documents.").

STATEMENT

As explained in more detail in the Petition, this matter involves a challenge by New York, California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New Mexico, Pennsylvania, Rhode Island, Vermont, Wisconsin, and the

District of Columbia as well as various local governments and private entities (collectively "New York") to the Environmental Protection Agency's regulations for determining when the Clean Air Act's New Source Review provisions apply. Specifically, New York contends that 40 C.F.R. §§ 52.21(b)(2)(iii)(a) and 52.21(cc) which is the Equipment Replacement Provision of the Routine Maintenance, Repair, and Replacement Exclusion ("the Rule"), is invalid.

The Clean Air Act, 42 U.S.C. §§ 7401 through 7671q, provides for a pre-construction permitting program referred to as New Source Review. *See* 42 U.S.C. §§ 7475 and 7503. The New Source Review program applies in areas where air quality does not meet the National Ambient Air Quality Standard promulgated by EPA for a specified air pollutant and in areas that do meet the National Ambient Air Quality Standard or are unclassifiable. *Id.*

Activities at existing stationary sources for which a "pre-construction" permit may be required are those that constitute a "modification" of the source.[1] Routine maintenance, repair, and replacement have been excluded from New Source Review requirements since the program's inception. In the challenged Rule, EPA provided a category

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[1] For New Source Review purposes, as provided by 42 U.S.C. § 7479(2)(C) and 42 U.S.C. § 7501(4), the term "modification" is defined as:

> The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

42 U.S.C. § 7411(a)(4).

of equipment replacement activities that are not subject to major New Source Review requirements under the routine maintenance, repair, and replacement exclusion. Environmental Protection Agency, *Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR); Equipment Replacement Provision of the Routine Maintenance Repair and Replacement Exclusion*, 68 Fed. Reg. 61248, 61248-49 (Oct. 27, 2003). As provided in the challenged Rule, replacement of broken or deteriorating equipment at a stationary source is *not* a modification of that source *if*: (1) the replacement equipment is identical or functionally equivalent to the equipment being replaced; (2) the source's basic design does not change; and (3) it does not cause emissions in excess of any Clean Air Act emission limitation to which the source is subject. Even if the project meets all of these criteria, however, the permitting authority must still review the project as a potential modification *if* the project is very expensive (i.e., if the cost of the replacement equipment exceeds twenty percent of the cost of a comparable new process unit). 40 C.F.R. § 52.21(cc).

In the court below, the Intervening States argued that the Rule serves two important purposes. First, the Rule provides a much-needed clarification of the meaning of the terms "modification" and "physical change" in the Equipment Replacement Provision of the Routine Maintenance, Repair, and Replacement Exclusion in the New Source Review Program. The bright-line threshold established by the Rule will give States and regulated entities the regulatory certainty needed to make rational choices about environmental and energy impacts. *See Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805, 806 (7th Cir. 2005) ("[T]he first virtue of any jurisdictional rule is clarity and ease of

implementation."). Second, the Rule removes any incentive for the owners and operators of generating facilities to delay the routine replacement of equipment. Although making such replacements improves the reliability, efficiency, and safety of generating facilities, owners and operators frequently delay such replacement because they fear that the New Source Review requirements will apply. *See* Environmental Protection Agency, *New Source Review: Report to the President* 30-31 (2002). The Rule ensures that replacement decisions are based on reliability, efficiency, and safety considerations.

Ultimately, the District of Columbia Circuit found that the Rule was invalid, finding it "contrary to the plain language of" the definition of "modification" in the Clean Air Act. The court of appeals emphasized that the statutory definition of modification uses the term "*any* physical change," 42 U.S.C. § 7411(a)(4) (emphasis added). "[W]hen Congress places the word 'any' before a phrase with several common meanings, the statutory phrase encompasses each of those meanings. . . . " *New York v. EPA*, 443 F.3d 880, 888 (D.C. Cir. 2006). Thus, "[a]lthough the phrase 'physical change' is susceptible to multiple meanings, the word 'any' makes clear that activities within each of common meanings of the phrase are subject to [New Source Review] when the activity results in emission increase." *Id.* at 890. Moreover, the District of Columbia Circuit found that the EPA interpretation was contrary to history and the structure of the Act. *Id.* Subsequently, the court of appeals denied rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons. First, the legal effect of the lower court's ruling is far reaching. The court of appeals effectively held that when Congress uses the word "any" in a statute to modify an ambiguous term, an agency's discretion to construe statutory terms is eliminated. The agency must adopt the broadest possible interpretation of a phrase that is otherwise ambiguous. Such a result contradicts the principle that a statutory term must be construed in context, rather than isolation. *See Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). Indeed, this Court repeatedly has recognized that, in some contexts, the word "any" can have something less than the broadest possible meaning. *See Small v. United States*, 544 U.S. 385, 388 (2005); *Nixon v. Missouri Mun. League*, 541 U.S. 125, 132 (2004); *Middlesex County Sewage Auth. v. National Sea Clammer's Ass'n*, 453 U.S. 1, 15 (1981). Thus, it is possible that "any physical modification" means something less than all conceivable physical modifications. Moreover, by requiring the broadest possible construction whenever the term "any" is used with an admittedly ambiguous term, the lower court contradicted the principles of *Chevron, USA v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Second, the practical effect of the District of Columbia Circuit ruling is to invalidate a significant EPA regulatory initiative that was quite important to utilities with coal burning power plants and to States that have such plants and/or produce significant amounts of coal. Prior to the EPA's attempt to promulgate the Rule, application of the routine maintenance exclusion depended upon a multi-factor case-by-case determination that was uncertain and inconsistent. The new Rule was an attempt to establish a

bright-line standard that would result in certainty and consistency.

CONCLUSION

For the reasons stated above and in the Petition itself, the Petition for Certiorari should be **GRANTED.**

Respectfully submitted,

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No. 06-736

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

STATE OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

By holding that "any physical change" is unambiguous even though "physical change" is ambiguous (Pet. App. 5a-7a), the court of appeals contravened settled principles of statutory construction and this Court's cases construing the term "any." Under ordinary interpretive principles, "any physical change" is subject to multiple meanings—a point underscored by regulations that the Environmental Protection Agency (EPA) promulgated *before* Congress adopted the statutory New Source Performance Standards (NSPS) definition of "modification" for the New Source Review (NSR) program. The court of appeals' contrary holding would not only invalidate this important rulemaking, it would also hamstring EPA's ability to implement the NSR program in the future and call into question numerous longstanding aspects of that program. The decision would also pose a substantial threat to the interpretive discretion of all agencies charged with administering statutes that use the common term "any."

A. The Common Term "Any" Does Not, By Itself, Dispel Ambiguity In The Terms It Modifies

The court of appeals fundamentally erred by holding that "any physical change" is unambiguous even though "physical change" is ambiguous. See Pet. App. 5a-7a. Although respondents argue (Br. in Opp. 8) that the court of appeals did not rely solely on the word "any," that court, in fact, held that "[b]ecause Congress used the word 'any,' EPA must apply NSR whenever a source conducts an emission-increasing activity that fits within one of the ordinary meanings of 'physical change.'" Pet. App. 7a. And again: "[W]hen Congress places the word 'any' before a phrase with several common meanings, the statutory phrase encompasses each of those meanings; the agency may not pick and choose among them." *Id.* at 12a; see *id.* at 6a, 17a.*

As this Court has explained, however, "'any' can and does mean different things depending upon the setting." *Nixon* v. *Missouri Mun. League*, 541 U.S. 125, 132 (2004). Even when "any" is used as a catchall, it does not "define what it catches." *Flora* v. *United States*, 362

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* Although the court of appeals noted that Congress limited the definition of "modification" to physical changes that "increase[] the amount of any air pollutant" (42 U.S.C. 7411(a)(4)), the court discussed the latter clause only after deeming the statute unambiguous because it uses the word "any." See Pet. App. 11a-12a. Moreover, the requirement that a physical change increase air pollution in order to be considered a "modification" has no bearing on the meaning of "any physical change." Instead, increasing air pollution is a *separate* aspect of the definition of "modification." That separate aspect was the subject of the D.C. Circuit's decisions in *New York* v. *EPA*, 413 F.3d 3 (2005), and *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 399-400 (1979), and is now before this Court in *Environmental Defense* v. *Duke Energy Corp.*, No. 05-848 (argued Nov. 1, 2006).

U.S. 145, 149 (1960). Just this Term, this Court held that a statute's "reference to '*every* action for money damages' founded upon '*any* contract'" did not include administrative (as opposed to judicial) actions, because the terms "'every' and 'any' * * * do not broaden the ordinary meaning of the key term 'action.'" *BP Am. Prod. Co.* v. *Burton*, 127 S. Ct. 638, 644-645 (2006) (quoting 28 U.S.C. 2415(a)). So too here, "any" does not unambiguously require the broadest reading of the term "physical change."

The court of appeals' contrary holding appears to be unprecedented. While this Court has occasionally read statutes broadly based in part on their use of the term "any," the Court has never rejected an agency's interpretation on that ground. Rather, in those cases the Court was generally making its own determination of the best reading of a statute outside of the framework proscribed by *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Pet. 12-13. Respondents' retort (Br. in Opp. 7) that "*Chevron* step one * * * entails *judicial* determination of a statute's meaning" misses the point: under the first step of *Chevron*, the judicial determination concerns not what a statute means, but rather whether the statute is ambiguous. And, of course, when a court construes an ambiguous statute in the absence of an authoritative agency interpretation, its selection of the best reading of the statute does not foreclose the administering agency's ability to select another permissible interpretation instead. *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 125 S. Ct. 2688, 2700 (2005).

Moreover, this Court has narrowly construed statutory phrases including the word "any" at least as often as it has broadly construed them. See Pet. 12, 13. While respondents (Br. in Opp. 10) discount some of those

cases on the ground that a broader reading of "any" would have contravened a strict-construction canon, that does not account for all of the cases. See *Flora*, 362 U.S. at 150-151 (resorting to "other materials," including relationship with other statutes, only after determining the text was ambiguous); *BP Am.*, 127 S. Ct. at 644-645 (concluding that the terms "any" and "every" "do not assist petitioners" because they do not broaden the terms they modify).

The most analogous example is perhaps *Chevron* itself. There, this Court held that the Clean Air Act's definition of "stationary source," which included "any building," was ambiguous. 467 U.S. at 859-862 (quoting 42 U.S.C. 7411(a)(3)). While respondents argue (Br. in Opp. 11) that the definition of "stationary source" was not implicated by the specific question in that case—viz., whether individual buildings in a complex were separate stationary sources—this Court specifically recognized that "the definition * * * could be read to impose the [NSR] permit conditions on an individual building that is a part of a plant." *Chevron*, 467 U.S. at 860. The Court nonetheless concluded that the definition was ambiguous on that point. *Id.* at 861-862. Under the court of appeals' holding in this case, however, the statute would not be ambiguous, because "any building" would take its broadest meaning, including a building that is part of a larger plant.

There is no basis for respondents' assertion (Br. in Opp. 11-12 & n.8) that the United States has taken a contrary position. One of the government briefs cited by respondents did not rely on the term "any," but instead relied on the meaning of the term that followed it. Gov't Br. at 13-15, *Engine Mfrs. Ass'n* v. *South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (No. 02-1343).

The other brief argued that Congress's use of the term "any" in one but not another portion of a statute supported the Government's interpretation; the Government did not argue that "any," standing alone, had special significance divorced from context, much less that it rendered an otherwise ambiguous term unambiguous. Gov't Br. at 19, *South Fla. Water Mgmt. Dist.* v. *Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (No. 02-626).

B. The Clean Air Act's Definition Of "Modification" Does Not Unambiguously Require The Broadest Meaning Of "Physical Change"

The court of appeals' error was critical in this case because, under traditional canons of statutory construction, the definition of "modification" does not unambiguously require the broadest meaning of "physical change." Not only is the phrase "physical change" "susceptible to multiple meanings," as the court of appeals recognized, Pet. App. 5a, the statutory context also demands that the agency distinguish between routine efforts to maintain a facility and efforts to change the facility. When Congress crafted the statutory NSR program in 1977, it adopted the statutory definition of "modification" already used in the NSPS program. See Pet. 3-4. Respondents do not dispute that from the earliest days of the NSPS program, EPA interpreted that definition to exclude routine maintenance, repair, and replacement, as well as a number of other activities that could increase emissions by more than *de minimis* amounts. See Pet. 4-5, 16-17. Congress's decision to adopt the pre-existing statutory definition without modification strongly suggests that it viewed the agency's existing approach as a permissible interpretation of the statutory definition.

None of respondents' contentions detracts from that conclusion. While respondents argue that the Government is now advancing a ratification argument it previously disclaimed, the Government's position has always been the same: that while Congress did not set in stone the agency's previous interpretation, *i.e.*, ratify it, such that the agency would lack authority to modify it, Congress's adoption of the statutory NSPS definition of "modification" confirms that the agency's pre-existing interpretation of that definition is reasonable. See Pet. 20 n.9. Respondents misleadingly quote the Government's court of appeals brief as stating that "EPA does not contend that . . . Congress 'ratified' [the routine maintenance] exclusion; in fact, EPA has explicitly disclaimed any such argument." Br. in Opp. 12 (quoting Gov't C.A. Br. 19). But respondents omit the very next sentence of that brief, which explains that "Congress's action does, however, suggest that Congress did not consider EPA's interpretation of 'modification' (and more particularly 'physical change') to exclude routine maintenance, repairs and replacements to be unreasonable or outside of EPA's discretion." Gov't C.A. Br. 19-20.

Respondents' contention (Br. in Opp. 13) that to prove ratification, the Government must demonstrate "that Congress was aware of, and intended to incorporate, the preexisting regulatory exemptions," is thus directed toward an argument EPA has not made. (In any event, Congress was clearly aware of EPA's regulations, because it explicitly rejected some of them while directing that the others remain in place, at least for an initial period. 42 U.S.C. 7478.) With respect to the argument the Government *is* making, respondents argue only that "[w]here the law is plain, subsequent reenactment" is not relevant. Br. in Opp. 14 (quoting *Brown* v.

Gardner, 513 U.S. 115, 121 (1994)). As discussed, however, the statutory text is not plain, because the term "any" is not dispositive.

Respondents also misperceive the relevance of EPA's longstanding regulations. They note that EPA "generally had interpreted the [routine maintenance] exclusion as being limited to *de minimis* circumstances." Br. in Opp. 15 (quoting 70 Fed. Reg. 33,841 (2005)). But respondents erroneously conflate de minimis *circumstances* with de minimis *emissions increases*. *Id.* at 2, 15. The routine maintenance, repair, or replacement exclusion has, since its inception, turned on a "case-by-case determination * * * weighing the nature, extent, purpose, frequency, and cost *of the work* as well as other relevant factors to arrive at a common sense finding." Pet. App. 3a-4a (quoting 67 Fed. Reg. 80,292-80,293 (2002)) (emphasis added). Thus, the inquiry has turned on the nature of the work, not on the extent of any resulting emissions increases. Pet. 16-17.

Respondents also err (Br. in Opp. 15) in attempting to dismiss the significance of other longstanding regulatory exclusions from the definition of "modification"—including exclusions for increases in the production rate or hours of operation, and for changes in fuel or raw materials—on the theory that those exclusions "construed statutory language not at issue here." The statutory definition of "modification" refers in part to "any physical change in, or change in the method of operation of, a stationary source." 42 U.S.C. 7411(a)(4). Even assuming that the other longstanding exclusions are "change[s] in the method of operation," rather than "physical change[s]," *ibid.*, both clauses are part of the definition of "modification," and both use the term "change" modified by "any." Thus, at the time Congress

adopted the statutory NSPS definition of "modification," EPA's regulations made clear that the statutory phrase "any * * * change" did not include all activities causing non-de minimis emissions increases.

C. The Question Presented Warrants Review

This case warrants this Court's review for a number of reasons. The term "any" is commonly used in statutes—as seen by the number of times this Court has considered that term. If "any" dispelled ambiguity in the terms that follow, and thereby required agencies to give those terms their broadest meanings, agencies could lose discretion to give reasonable interpretations to numerous administrative-law statutes. The importance of the D.C. Circuit's decision is magnified by that court's prominence in administrative law.

Even apart from its broader significance, the decision below would warrant review in light of its impact on NSR. As petitioners in *Utility Air Regulatory Group* v. *New York*, No. 06-750 (filed Nov. 27, 2006), explain, and respondents do not dispute, this Court has granted review in several cases concerning NSR and the related Prevention of Significant Deterioration program. 06-750 Pet. at 19-20. This NSR case has particular importance because the court of appeals' decision invalidates a vitally important rulemaking, puts EPA in a straightjacket going forward, and even jeopardizes exclusions that EPA has recognized *since the very inception of the NSR program*. Those exclusions include not only the routine maintenance, repair, and replacement exclusion, but also exclusions for increased hours of operation, increased production rate, and changes in fuels or raw materials—all of which can cause non-de minimis increases in emissions. See Pet. 16-19, 24; pp. 5-7, *supra*.

By contending (Br. in Opp. 16-17) that only changes that cause more than de minimis emissions increases will trigger NSR requirements under the court of appeals' decision, respondents only underscore the problems posed by that decision. As discussed, EPA has never limited the routine maintenance exclusion to de minimis emissions increases. Nor has it limited the other exclusions to de minimis increases. Thus, the court of appeals' decision not only invalidates this important rulemaking, but also suggests that EPA must alter its longstanding approach.

Moreover, much of the point of the exclusions is to eliminate the need to engage in a burdensome and uncertain process of determining, on a case-by-case basis, whether particular activities are subject to NSR. Pet. 22. That EPA has some flexibility to determine how to calculate an emissions increase (Br. in Opp. 16-17) does little if anything to address the burdens caused by requiring EPA to determine in every case whether an activity would cause a non-de minimis increase, and to apply NSR to every activity that would do so.

Respondents also argue incorrectly (Br. in Opp. 18-19) that EPA's regulation would harm the environment. At the outset, that contention is beside the point, because the court of appeals determined at the first *Chevron* stage that EPA has *no* relevant discretion. Even if EPA's line-drawing were in some way flawed (it is not), that would be relevant only to respondents' *Chevron* step-two and arbitrary-and-capricious challenges, which the court of appeals did not reach; it would not be a reason to deprive the agency of *all* discretion going forward. Moreover, the statute does not direct EPA to consider only maximizing protection for the environment; as the court of appeals acknowledged, the statute strikes a

"balance * * * between 'the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality.'" Pet. App. 11a (quoting *Chevron*, 467 U.S. at 851); see *id.* at 8a.

In any event, EPA's rule has environmental benefits. Respondents contend (Br. in Opp. 2-3, 15, 19) that the rule's 20% cost threshold could allow costly replacements that could, in turn, substantially increase a plant's annual emissions. But EPA's rule applies only to functionally equivalent replacements that are consistent with a source's basic design parameters and do not cause the source "to exceed any emission limitation, or operational limitation * * * that is legally enforceable." 40 C.F.R. 52.21(cc)(3). The rule thus does not serve as a license to engage in any and all emissions-increasing changes below a 20% cost threshold.

Most important, respondents do not dispute that the uncertainties inherent in EPA's former case-by-case approach deterred companies from making repairs that would make their plants cleaner and more efficient. Nor do respondents appear to deny that encouraging such repairs would benefit the environment, in part by reducing high-emission restarts, shut-downs, and malfunctions. In any event, EPA's expert judgment on that point is certainly reasonable. See Pet. 21-23.

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For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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FEBRUARY 2007